Supreme Court, U.S.
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In The Supreme Court of the United States

LYNDON H. LAROUCHE, JR., et al.,

Appellants,

v.

DONALD L. FOWLER AS CHAIRMAN, DEMOCRATIC NATIONAL COMMITTEE, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

If the Democratic Party, in jurisdictions subject to Section 5 of the Voting Rights Act, undertakes to arbitrarily nullify votes previously cast for President of the United States or delegate to the Democratic National Convention in state primary elections and Democratic caucuses and conventions, and to change the criteria for who may be a candidate for President or delegate to the Democratic National Convention, are these changes in rules and procedures subject to preclearance under Section 5?

Does the Democratic Party's right to define itself supersede its obligations under Section 5 of the Voting Rights Act when the Democratic Party in covered jurisdictions implements new rules defining who may vote for delegate to the Democratic National Convention, which votes for President or delegate will count, and who may be a candidate for President or delegate to the Democratic National Convention?

Applicability of 28 U.S.C. § 2403(a)

28 U.S.C. § 2403(a) may apply since the three-judge district court's decision below questions the constitutionality of § 5 of the Voting Rights Act if it is construed to apply to the Democratic Party rules and procedures at issue in this case. The court below did not certify to the Attorney General that the constitutionality of an Act of Congress was drawn into question.

PARTIES

The following were parties in the courts below:

Lyndon H. LaRouche, Jr.,
Committee to Reverse the Accelerating
Global Economic and Strategic Crisis--
A LaRouche Exploratory Committee,
Alex D. Promise,
Charles Shaw,
Delores Whitaker,
Nathaniel Sawyer,
Joel Dejean,
Eloi Morales,
Geneva Jones,
Grace Littlejohn,
Maria Elena Leyva Milton,

Plaintiffs,

Donald L. Fowler, As Chairman Democratic Party National Committee,
Democratic National Committee,
James L. Brady, As Chairman Louisiana Democratic Party,
Louisiana Democratic Party,
Louisiana State Democratic Party Central Committee,
Sue Wrenn, as Chairman Virginia Democratic Party,
Kenneth Geroe, As Chair of the Virginia Second Congressional District Caucus,
Virginia Democratic Party,
William White, as Chairman Texas Democratic Party,
Texas Democratic Party,
Texas State Democratic Executive Committee,

William Simons, as Chairman, District of Columbia State Committee,
District of Columbia Democratic Party,
District of Columbia Democratic Committee,
Samuel Coppersmith, as Chairman Arizona Democratic Party,
Arizona Democratic Party ,
Arizona State Democratic Committee,

Defendants.

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No. 99-_____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LYNDON H. LAROUCHE, JR., ALEX D. PROMISE, CHARLES SHAW, DELORES WHITAKER, NATHANIEL SAWYER, JOEL DEJEAN, ELOI MORALES, AND MARIA ELENA LEYNA-MILTON,

Appellants,

v.

DONALD L. FOWLER AS CHAIRMAN, DEMOCRATIC NATIONAL COMMITTEE, JAMES L. BRADY AS CHAIRMAN, LOUISIANA DEMOCRATIC PARTY, LOUISIANA DEMOCRATIC PARTY, LOUISIANA DEMOCRATIC STATE CENTRAL COMMITTEE, SUE WRENN, AS CHAIRMAN VIRGINIA DEMOCRATIC PARTY, KENNETH GEROE, AS CHAIR OF THE VIRGINIA 2nd CONGRESSIONAL DISTRICT CAUCUS, VIRGINIA DEMOCRATIC PARTY, WILLIAM WHITE, AS CHAIRMAN TEXAS DEMOCRATIC PARTY, TEXAS DEMOCRATIC PARTY, TEXAS STATE DEMOCRATIC PARTY EXECUTIVE COMMITTEE, SAMUEL COPPERSMITH AS CHAIRMAN ARIZONA DEMOCRATIC PARTY, ARIZONA DEMOCRATIC PARTY, ARIZONA STATE DEMOCRATIC PARTY COMMITTEE,

Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and order of the three-judge district court are contained in the Appendix to this Jurisdictional Statement [hereafter "J.S. App"], at pages 1a through 16a . The District Court's opinion is not yet officially published but is available on WESTLAW, 99 WL 1087016. The United States Court of Appeals for the District of Columbia Circuit rendered a prior decision in this case which is published at 152 F.3d 974 and is contained in the Appendix. (J.S. App. at pp. 17a-59a).

JURISDICTION

The three judge district court entered judgment against appellants on November l, 1999. (J.S. App. at p. 1a). The Notice of Appeal was filed in the District Court on November 19, 1999. (J.S. App. at p. 62a). This Court has jurisdiction pursuant to 28 U.S.C. § 1253, 28 U.S.C. § 1291 and 42 U.S.C. § 1973(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves Section 5 of the Voting Rights Act as amended, 42 U.S.C. 1973(c) and 42 U.S.C. 1973l(c), and the Attorney General's Procedures For the Administration of Section 5 of the Voting Rights Act ("Attorney General's Regulations"). (J.S. App. pp. 64a-73a).

STATEMENT OF THE CASE

This case arises from Lyndon H. LaRouche, Jr.'s campaign for President in 1996. Appellants, other than LaRouche, are Democratic Party voters of African-American or Hispanic descent who voted for LaRouche, or wished to vote for LaRouche as their preferred candidate for the Democratic Presidential nomination, in jurisdictions which are covered by the Voting Rights Act of 1965. Appellants, other than LaRouche, were also themselves potential candidates for election as delegates to the Democratic National Convention or were qualified to vote for delegates to the Democratic National Convention as a result of the 1996 Democratic Party primary or caucus procedures. In January 1996, the then Chairman of the Democratic National Committee, Donald L. Fowler, declared LaRouche not to be "a bona fide Democrat" and instructed state parties in their National Convention delegate elections to "disregard any votes that might be cast for Mr. LaRouche" and "not to recognize the selection of delegates pledged to him at any stage of the delegate selection process." [1] (J.S. App. p. 74a). As a result of Fowler's directive and the accompanying threat that if it was not followed by state parties, their delegations would not be seated at the National Convention:

> • the Arizona Democratic Primary, where LaRouche was on the ballot, was successfully cancelled by the Democratic Party and a private Democratic party primary, excluding LaRouche, was held in its stead;

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[1] To justify his order to disregard and nullify the votes of Democratic party members, Fowler penned a crude and scurrilous diatribe falsely accusing LaRouche of racism, anti-Semitism and fraud. Despite efforts by leading Democrats, including former Congressmen and African-American elected officials to challenge Fowler's actions within the Party, their protests were ignored. (J.S. App. p. 77a.)

• Virginia Democrats dissolved a Congressional District Caucus which had enough Democratic voters pledged to LaRouche to elect a delegate to the National Convention and instructed the delegates at the Caucus that they would only be allowed to vote and run for delegate if they supported Bill Clinton for President;

• Texas Democrats stripped delegates of their elected party positions because they were pledged to LaRouche and substituted other Democrats as State Convention delegates;

• Louisiana Democrats refused to hold a caucus to elect a LaRouche delegate to the National Convention despite the fact that LaRouche received sufficient votes in the Louisiana Presidential Preference Primary to qualify a delegate for the convention and despite the fact that state law mandated that a delegate be chosen.

None of these changes in rules concerning who might be a Presidential candidate or Delegate to the Democratic National Convention, who could vote, and what the effect of votes would be, were precleared with the Attorney General or the United States District Court for the District of Columbia as required by Section 5 of the Voting Rights Act.

In *Morse v. Republican Party of Virginia*, 517 U.S. 198 (1996), this Court held that electoral nominating activities of political parties in covered jurisdictions for public or party office are subject to preclearance under Section 5. The Court applied the legal framework of the White Primary Cases in interpreting the Voting Rights Act, and rejected the claim that this framework did not apply because the nominating procedure in question did not operate in a racially discriminatory fashion:

> "[T]he decision whether discrimination has occurred or was intended to occur, as we have explained on many occasions," is for the Attorney General or the District

> Court of the District of Columbia to make in the first instance . . . The critical question for us, as for the District Court below, is whether "the challenged alteration has the *potential* for discrimination". *Hampton County Election Comm'n*, 470 U.S. at 181 (emphasis in original.)

Morse, 517 U.S. 198 at pp. 216-217 (internal citations omitted).

Despite this Court's clear judgment in *Morse*, the three judge district court below declared itself unable to discern "clear instruction" from the case and found *Morse* "difficult to apply as binding precedent". (J.S. App. pp. 6a, 7a). The district court held that the Democratic Party was not required to preclear national party electoral nominating rules intended for implementation in covered jurisdictions because the "delegation theory of *Morse* does not extend that far." (J.S. App. p.7a). It further held that if Section 5 is construed to require state parties to preclear rules specifying who can run for public or party office, who can be listed on Democratic Party primary ballots, and who can vote for candidates and which votes will be counted, then Section 5 "impermissibly intrudes upon the Party's constitutional right to associate." (J.S. App. pp. 7a, 12a). History shows, however, that nothing has more potential to discriminate than the unchecked and unreviewed power of Party officials to define who may vote and who may be candidates for public or party office. The White Primary Cases also show that the absolute right the Democratic Party now claims it has--the right to define itself as an exclusive private club--was used for decades as the primary means to disenfranchise minority voters. The district court's decision thus revives and legitimizes the Democratic Party's principal legal claim in the White Primary Cases while effectively taking the most important nominating activity of all--the nominating process for President of the United States--outside the purview of the Voting Rights Act.

The Voting Rights Act was passed in 1965 by a Congress which was "confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution." *South*

Carolina v. Katzenbach, 383 U.S. 301, 309 (1966). Despite the 14th, 15th and 24th Amendments to the Constitution barring discrimination in voting, and despite court rulings and positive laws enforcing these provisions, various states and the Democratic Party politicians who governed those states, bent on perpetuating the white status quo and subverting the Constitution, created ever new devices by which to deny minorities the right to vote. As soon as court decrees enforcing the Constitution or Civil Rights Acts were obtained, often after years of litigation, "the states affected . . .merely switched to discriminatory devices not covered by the federal decrees or enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Id.* at 311-314. Section 5 is the central and most stringent of the remedies for discrimination in the Act. It prohibits the enactment or enforcement in a covered jurisdiction of changes in voting qualifications or procedures that differ from those in effect on November l, 1964 or two subsequent dates. In order to obtain preclearance:

> the covered jurisdiction must demonstrate that its new procedure "does not have the purpose and *will not have the effect of denying of abridging the right to vote on account of race or color or [membership in a language minority group]*". The fact that such a showing could have been made, but was not, will not excuse the failure to follow the statutory preclearance procedure. "Failure to obtain either judicial or administrative preclearance 'renders the change unenforceable.'"

Morse, 587 U.S. at 595, & F.N. 5 quoting *Clark v. Roemer*, 500 U.S. 646, 652, (1991) (emphasis supplied).

In *Morse*, this Court reiterated its previous broad construction of Section 5:

> § 5, like the constitutional provisions it is designed to implement, applies to all entities *having power over any aspect of the electoral process within designated*

> *jurisdictions* . . . "§ 5 is expansive within its sphere of operation and comprehends all changes to rules governing voting." *Presley v. Etowah County Com'm,* 502 U.S. 491, 501 (1992).
>
> * * *
>
> We have consistently construed the Act to require preclearance of any change in procedures or practices that may bear on the "effectiveness" of a vote cast. . . .Rules concerning candidacy requirements and qualifications, we have held, fall into this category because of their potential to "undermine the effectiveness of voters who wish to elect [particular candidates]." *Allen,* 393 U.S., at 570. In its reeactments and extensions of the Act, moreover, Congress has endorsed these broad constructions of §5.

Morse, 517 U.S. at 204-205, emphasis supplied.[2]

In 1996, LaRouche qualified for the ballot and amassed 597,853 votes in 26 Democratic Party primaries.[3] In Louisiana, which is a covered jurisdiction subject to § 5's preclearance requirements, LaRouche received sufficient votes in the

---

[2] Congress extended the provisions of Section 5 for 25 years in 1982, citing the "fragility" of the gains made by minorities to date and the fact that the task of insuring minority voters equal protection under the laws was far from complete. "Without the preclearance of new laws, many of the advances of the past decade could be wiped out overnight by new schemes and devices." S. Rep. No. 417 reprinted in 1982 U.S. Code Cong. & Admin. News at p.186.

[3] This case is before the Court following the district court's dismissal for failure to state a claim. Accordingly, the facts are taken from appellants' complaint and various affidavits and statements made by appellees.

Louisiana Presidential Preference Primary to elect a delegate to the Democratic National Convention in the 6th Congressional District. Appellants Charles Shaw and Alex Promise were registered Democratic voters of African-American descent who voted for LaRouche in that District.

The Louisiana Presidential Preference primary statute specifies a two-step procedure for election of delegates to the Democratic National Convention. The state holds a primary election in which Democratic voters express their presidential preference. La. Rev. Stat. §18:1280.21. After that election, the Democratic Party holds caucuses to select delegates which must be apportioned according to the Presidential primary vote. La. Rev. Stat. §18:1280.27. Rather than award LaRouche the delegate to which he was entitled under Louisiana law, the Louisiana Democratic Party appellees refused, citing the Fowler letter, and thereby nullified the votes of Shaw and Promise. The Louisiana Democrats did not preclear the procedures and rules which nullified the effect of votes cast for LaRouche in the Primary.

Under Virginia state law, political parties nominate candidates for office through primary elections or through convention or caucus procedures at the party's option. Va. Code § 24.2-508. In 1996, the Virginia Democratic Party chose a caucus and convention procedure to select delegates to the Democratic National Convention and to nominate candidates for other offices. District level delegates to the Democratic National Convention were elected as a result of a two-step process: election at the city and county caucuses, followed by election at Congressional District conventions.

LaRouche's delegate slate in the Second Congressional District was 25% African-American and included other minorities. Delegates pledged to LaRouche, including appellants Delores A. Whitaker and Nathaniel H. Sawyer, participated in the city and county caucus procedures and were elected as delegates to attend the Second Congressional District Convention called to directly elect delegates to the National Convention. At the Second Congressional District Convention, however, their ability

to pursue their candidacies and to vote was abruptly terminated. The LaRouche caucus composed 24.58% of those attending, and under the Delegate Selection Rules, the LaRouche delegates were entitled to vote for and elect, from their caucus, one LaRouche delegate to attend the Democratic National Convention. Stating that he had just been handed the Fowler letter directive by the Democratic Party's attorney at the Convention, Second Congressional District Democratic Chair Kenneth Geroe, cited the Fowler letter directive and hastily passed "temporary rules" to disband the LaRouche caucus, declaring it "non-viable". He stated that the delegates pledged to LaRouche could vote and participate in the caucus proceedings if they changed their votes to support Bill Clinton. Timely challenges to this procedure were ignored by both the Virginia Democratic Party and the Rules and Bylaws Committees of the National Democratic Party.

Virginia is a covered jurisdiction and the Virginia Democratic Party appellees pre-cleared their Delegate Selection Plan for the National Convention with the Attorney General. The temporary rules employed at the Second Congressional District Caucus, the Fowler letter directive, and the other procedures used to disenfranchise LaRouche delegates were not precleared.

In Arizona, state law established a presidential preference primary in which Democratic voters could express their preference for a candidate for President. Arizona Rev. Stat. §16-241. The Arizona statute also required that each delegate to the convention use his or her best efforts to reflect the choices of Democratic voters at the Democratic Party National Convention. Arizona Rev. Stat. §16-243. LaRouche was qualified by Arizona for the state's presidential primary ballot and Arizona precleared its proposed primary election with the Attorney General. Citing the Fowler letter directive, the Arizona Democratic Party defendants successfully sued in the Superior Court of Maricopa County to cancel the Democratic Primary. A Democratic Party financed primary, which excluded LaRouche's candidacy, was held instead of the state primary election. Appellant Maria Elena Leyva-Milton is a registered Democratic voter of Hispanic descent who wished to vote for LaRouche. She was

disenfranchised by this action. The cancellation of the Arizona Democratic Primary and the substituted Democratic Party run primary elections were not precleared.

Texas held a presidential preference primary followed by caucus procedures in order to elect delegates to the Texas State Democratic Convention which would, in turn, elect delegates to the Democratic National Convention. Texas Election Code § 191.001-191.032. LaRouche received 28,258 votes in the Texas Democratic Party primary. Appellants Joel Dejean, a Democratic voter of Haitian descent and Eloi Morales, a Democratic voter of Hispanic descent, were both elected as senate district caucus delegates, pledged to LaRouche, from precinct caucuses. Dejean was elected as a delegate from his senate district caucus to attend the State Convention.

Citing the Fowler letter, Texas Democratic Appellees denied Morales and other LaRouche delegates elected from precinct caucuses credentials to attend the 17th Senatorial District Caucus. At the State Convention, the same Fowler letter directive was cited to deny credentials to Dejean and other LaRouche delegates who had been duly elected as State Convention delegates from the 6th Senatorial District. As a result of this action, appellants Morales and Dejean and others similarly situated were stripped of the party office to which they had been elected and other Democrats, who had not been elected, filled their seats. The LaRouche Democrats were denied the opportunity to vote for delegates to the National Convention and their own right to be candidates for open National Convention delegate slots. The Texas Appellees did not preclear the changes in voting procedures and candidacy criteria.

Louisiana, Virginia, Texas, and Arizona each provide the Democratic Party Presidential nominee with a preferred place on their general election ballots. See La. Rev. Stat. §§ 18:465, :1254, :1257; Va. Code §§ 24.2-101, -542, -543, Tex. Elec. Code §§ 52.091, 192.031; Ariz. Rev. Stat.§16-243.

The Fowler letter directive cited Article VI of the Call to the Democratic National Convention and Rule IIK of the 1996 Delegate Selection Rules vesting the Chairman of the Democratic

Party with the ability to declare that presidential candidates are not "bona fide" Democrats. Fowler's orders to state party organizations were directly contrary to other Party rules, most significantly the Party's 1996 Delegate Selection Rule respecting an "open party" which states:

> 4. An Open Party.
> (1) race, sex, age, color, creed, national origin, religion, ethnic identity, sexual orientation, economic status, philosophical persuasion or physical disability (hereinafter collectively referred to as "status").
>
> (2) No test for membership in, nor any oath of loyalty to, the Democratic Party in any state should be required or used which has the effect of requiring prospective or current members of the Democratic Party to acquiesce in, condone or support discrimination based on "status."

Neither the Fowler letter directive nor the party provisions upon which it relied were precleared, despite the fact that they were promulgated with the clear intent to change voting procedures and candidate qualifications in covered jurisdictions. State parties were threatened that their delegations would not be seated at the National Convention, however, unless the directives were followed. Far from being able to participate in any process at the Democratic National Convention itself,[4] the enforcement of Fowler's directives prevented LaRouche delegates from even reaching the temporary roll of the convention and the credentials committee. In addition to violating the provisions of Section 5,

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[4] The Circuit Court of Appeals erroneously assumed in its decision that LaRouche and his delegates had avenues for relief open to them in the party or could somehow to take this fight to the convention floor. (J.S. App. p.60a). Nothing could be further from the case.

the actions of the Democratic Party appellees contravened 42 U.S.C. 1971(b) which states:

> (b). Intimidation, threats, or coercion. No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives . . . at any general, special or primary election held solely or in part for the purpose of selecting or electing any such candidate.

In August 1996, Appellants brought suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief and damages and alleging violation of Section 5 of the Voting Rights Act, other provisions of the Act, Constitutional Rights and 28 U.S.C. 1983. The District Court denied the application for a three-judge court and dismissed the entire complaint with prejudice as to all defendants pursuant to Fed. R. Civ. P. 12(b)(6). The D.C. Circuit Court of Appeals sustained the dismissal of appellants' 1983 and Constitutional claims, but reversed the dismissal of the Section 5 claim, remanding that claim to a three-judge District Court for further proceedings in light of this Court's decision in *Morse*.

When the three-judge Court convened, the DNC and Fowler argued that the national party was not a "covered jurisdiction" subject to Section 5 of the Voting Rights Act on renewed motions to dismiss. The state parties argued that they were only implementing mandatory national party rules. All of the Democratic appellees asserted that if Section 5 applies to voting and candidacy criteria for the offices of delegate to the Democratic National Convention and President of the United States, Section 5 is unconstitutional, because it invades the

Party's absolute right to "define itself." The motions to dismiss were granted, without discovery or further proceedings.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Voting Rights Act of 1965 was the culmination of a century-long struggle, dating from the Emancipation Proclamation, to secure the right to vote for black Americans and other minorities. It was a century in which the Democratic Party, the Party which had promoted slavery, secession, and segregation completely dominated political processes in the South and connived, with seemingly endless ingenuity, to insure that the voting rights of newly enfranchised blacks were stillborn. No sooner were blacks granted the right to participate in political processes and vote after the Civil War than they were removed from the rolls and once again disenfranchised by a series of machinations in the various states.[5] Thereafter, massive resistance survived Constitutional amendments, decisions of this Court enforcing the Constitution, Presidential executive orders, and the Civil Rights Acts of 1957 and 1964. The main weapons of war against the right to vote and the right to have votes counted did not consist, however, of the artifices and sophistries employed by racism's legal apologists. Citizens who sought to participate in the political process by registering to vote or running for office were lynched, murdered, beaten, jailed, extorted, and endlessly intimidated. Dr. Martin Luther King was demonized and vilified through a government sponsored defamation and harassment campaign. His case was not unique.

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[5] Professor C. Van Woodward, one of America's leading Southern historians, testified in graphic detail in the House hearings concerning the 1982 extensions of Section 5, about how quickly the gains made in voting rights "over a century ago were wiped out, as if overnight." House Hearings p. 2027, cited in 1982 U.S. Code Cong. & Admin. News at p.189.

In response to this Court's efforts to enforce the 14th and 15th Amendments and the Civil Rights Acts, the Democratic Party privatized its nominating processes. Since the 14th and 15th Amendments are triggered, on literal reading, by the actions of states, the Democratic strategy was to remove the state from a conspicuous role in the electoral process–thereby placing its discriminatory practices beyond the Constitution's purview. The White Primary cases document how the Democratic Party used the same arguments and procedures *which it now employs and argues in this case*, to deny blacks the right to vote for decades in the South. Then, as now, it was argued that since the Democratic nominating processes are private and since Democrats have a right to define their membership and freely associate without external interference, violations of the voting rights of party members voting in party elections are without legal remedy, since the law does not reach "purely private" or "party stages" of the electoral process. When this Court first heard this argument it sustained the Democratic Party's "privatization" scheme against constitutional challenge in *Grovey v. Townsend*, 295 U.S. 45 (1935). While *Grovey* was firmly repudiated years later in *Smith v. Allright* 321 U.S. 649 (1944) and *Terry v. Adams*, 345 U.S. 461 (1953), these decisions were only met with new and violent obstructions of the right to vote and to have votes counted.

The district court's decision explicitly resuscitates the discredited reasoning of *Grovey*. In so doing, it ignores the text and history of the Voting Rights Act, long-standing regulations by the Attorney General implementing the Act, this Court's holding in *Morse*, and other applicable precedents. It also ignores the reality of the present Democratic Party nominating process. This is not a privatized or internal process. Presidential preference primaries are held at public expense in most states of the union, resulting in the selection of the two candidates, Democratic and Republican, who will appear at the top of state ballots nationally. The Democratic Party receives the maximum federal subsidy for its convention, a subsidy in the millions of dollars as adjusted by the Consumer Price Index. 26 U.S.C. 9008, 11 C.F.R. 9008.1 *et seq.* In *Morse* this Court held that

Section 5 applies to all entities having "power over any aspect of the electoral process within designated jurisdictions". *Morse*, 517 U.S. at 204-205. If the Democratic Party's presidential nominating process is taken out of this coverage, as the district court would have it, it is difficult to fathom how "*Morse's* delegation theory" has any reach at all.

The district court's decision opens "a loophole in the statute the size of a mountain". *Morse*, 517 U.S. at 235. If the district court's sanctioning of Democratic appellees' claims to "private club" status holds, it invests the Democratic National Committee with the power to coerce state Democratic party organizations into violating state law and the Voting Rights Act (42 U.S.C. 1971(b) and 1973(c)) without anyone being held accountable for these violations. The state party elections at issue were being conducted under both state law and, in the case of Arizona and Virginia, under procedures which had been pre-cleared. Under threat of having their delegations to the Democratic National Convention disqualified, the state Democratic parties of Virginia, Louisiana, Texas and Arizona abruptly instituted new procedures which had not been pre-cleared. In the case of Louisiana, the DNC's coercion resulted in violation of the state law requiring that delegates be apportioned according to the votes cast in the primary election.

Accordingly, this Court should summarily reverse, or, alternatively, note probable jurisdiction.

I. § 5 OF THE VOTING RIGHTS ACT CLEARLY APPLIES TO DEMOCRATIC PARTY PRESIDENTIAL NOMINATING ACTIVITIES

Justice Stevens' opinion announcing the judgment of the Court in *Morse* and Justice Breyer's concurring opinion, both concentrate on the history of discriminatory party practices, from the White Primary Cases to the ouster of the Mississippi Freedom Democrats from the 1964 Democratic National Convention, in finding that Section 5 was intended to cover Party nominating procedures. Filling out these historical references brings the long

and infamous history of the "private club" justification for discriminatory practices into sharp focus.

The White Primary Cases

By 1930, Democratic Party rules barring blacks from participation in Democratic Party primaries were in force in eleven southern states. The Louisiana rule was typical: "no one shall be permitted to vote at said primary election except electors of the white race." Weeks, "The White Primary," *Mississippi Law Journal*, December 1935. The South Carolina Democratic Party rule was unique:

> Every negro applying for membership in a Democratic Party club, or offering to vote in a primary, must produce a written statement of ten reputable white men, who shall swear that they know of their own knowledge that the applicant or voter voted for General Hampton in 1876, and has voted the Democratic ticket continuously since.

Id. at 141[6].

Texas, unlike other southern states, put its white primary policy officially on the statute books, resulting in this Court's ruling in *Nixon v. Herndon*, that the Texas statute clearly violated the 14th Amendment. 273 U.S. 536 (1926). Texas responded within days by delegating the power to run primaries to the Democratic party executive committee, which quickly passed a resolution stating that only whites would be allowed to participate. This Court, by a 5-4 vote, struck down the new scheme also, but only because the rule did not originate from the Democratic Party State Convention. *Nixon v. Condon*, 286 U.S. 73, 88-89 (1932). Justice McReynolds' dissent in *Nixon v. Condon*, asserted a political party's absolute right to exclude:

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[6] General Hampton was the Governor of South Carolina and a leader of the "red shirts," the South Carolina version of the Klan. Wellman, M., Giant in Grey, New York, Scribner, 1949.

> Political parties are fruits of voluntary action. Where there is no unlawful purpose, citizens may create them at will and limit their membership as seems wise. The state may not interfere. White men may organize. Blacks may do likewise. A woman's party may exclude males. This much is essential to free government.

Nixon v. Condon, 286 U.S. at 104.

Texas Democrats proceeded to completely privatize their primary elections. Elections were paid for and administered by the Party, the ballots were provided and counted by the Party, and the resolution limiting participation to whites had been passed by the Texas Democratic Party Convention. The Texas state courts ruled that the First Amendment to the Texas Constitution provided the Democratic Party with an absolute constitutional freedom to associate and define its own membership free from state interference. Presented with these new circumstances, the *Grovey* Court ruled that there was no remedy for the black voter denied a ballot by the Texas Democratic Party because there was no "state action". *Grovey*, 295 U.S. 50-55.[7]

Smith v. Allright, 321 U.S. 649 (1944) presented exactly the same complaint by another black citizen of Harris County, Texas nine years later. This time, however, the Court chose to deal with the reality of the discriminatory scheme rather than the abstract and false legal constructs of its apologists. In repudiating *Grovey*, this Court held:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in

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[7] At oral argument in *Morse*, Justice Scalia expressed the view that if a political party wanted to hold a primary election restricted to party members and limit party membership to white voters only, they would be entitled to do so, so long as the Party paid for the primary. (Transcript *Morse v. Republican Party*, No. 94-203 p. 55).

> the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. . . the privilege of membership in a political party may be, as this Court said in *Grovey v. Townsend*. . . no concern of a state. *But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state.*

321 U.S. at 664-665 (internal citations omitted, emphasis supplied).

In response to *Smith v. Allright*, the Governor of South Carolina convened the state legislature in special session and all state laws governing primaries were repealed. When the NAACP challenged the all-white private Democratic primaries in Court, South Carolina Democrats argued that their political party was a mere private aggregation of individuals, and that blacks had no more right to vote in the Democratic Party primary in South Carolina than to vote in the "election of officers of the Forest Lake Country Club or the Colonial Dames of America." *Rice v. Elmore*, 165 F.2d 387, 392 & F.N. 1 (4th Cir. 1947). Again, the federal court saw through the Democrats' scheme:

> The fundamental error in defendant's position consists in the premise that a political party is a mere private aggregation of individuals, like a country club, and the primary is a mere piece of party machinery . . . The party may, indeed, have been a mere private aggregation of individuals in the early days of the Republic, but with the passage of years political parties have become in effect state institutions, governmental agencies through which sovereign power is exercised by the people . . .[t]he

> likelihood of a candidate succeeding in an election without a party nomination is practically negligible. . . *Those who control the Democratic Party as well as the state government cannot by placing the first steps under the officials of the party rather than the state, absolve such officials from the limitations which the federal Constitution imposes.*

Rice v. Elmore, 165 F.2d at 389, 393-393 (Emphasis supplied).

Rice only resulted in a new South Carolina Democratic Party scheme. Control of the primaries remained in clubs which excluded blacks from membership but blacks could vote in primaries if they swore an oath supporting segregation and opposing the Federal Fair Employment Practices Act--President Franklin Roosevelt's early effort to end segregation. In Court, the Party argued that the new rules were a protected exercise and a non-discriminatory effort to "define" the party and its membership. When South Carolina sought reconsideration of *Rice* based upon its new scheme, the Fourth Circuit again dismissed these arguments:

> the devices adopted showed plainly the unconstitutional purpose for which they were designed; *but even if they had appeared innocent, they should be enjoined if their purpose or effect* is to discriminate against voters on account of race. . . Courts of equity are neither blind nor impotent. . .and when it appears that discrimination is being practiced through rules of a party which controls the primary elections, these must be enjoined much as any other practice which threatens to corrupt elections or divert them from their constitutional purpose.

Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949) (Emphasis supplied).

Terry v. Adams, 345 U.S. 461 (1953) was the last of the White Primary Cases. Like many counties in the South, blacks were in the majority in Fort Bend, Texas following

Emancipation.[8] To address this situation, the Jaybird association was founded to "promote good government" and to hold all-white private pre-primary elections prior to the Democratic Party primary sponsored by the State of Texas in which blacks participated. Jaybird endorsed candidates entered the public primaries and almost always won those elections and the subsequent general election. Three justices of this Court found the Jaybird scheme unconstitutional based on simple reality:

> The only election that has counted in this Texas County for more than fifty years has been that held by the Jaybirds from which Negroes were excluded. . . *It is immaterial that the state does not control that part of this elective process which it leaves for the Jaybirds to manage. The Jaybird primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and who shall govern in this County. The effect of the whole procedure, Jaybird primary plus Democratic Party primary plus general election, is to do precisely that which the Fifteenth Amendment forbids--strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.*

Terry v. Adams, 345 U.S. 461 at 469. (Emphasis supplied).

Three other Justices concurred, finding that the Jaybird Association was a subterfuge for the activities of the Democratic Party and that under *Smith v. Allright*, the Democratic Party and any part of "the machinery for choosing officials" were subject to the Fifteenth Amendment:

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[8] In the registration of voters from May to September 1867, there were admitted to registry 153 white voters and 1334 colored voters in the county. *Terry v. Adams*, 90 F. Supp. 595, 597 (S.D. Texas 1950)

> Quite evidently the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party organization, selecting its nominees and using its machinery for carrying out an admitted design of *destroying the weight and effect of Negro ballots in Fort Bend County*. To be sure, the Democratic Primary and the general election are nominally open to the colored elector. But his must be an empty vote cast after the real decisions are made. And because the Jaybird endorsed nominee meets no opposition in the Democratic primary, the Negro minority's vote is nullified at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count.

Id. at 483-484.

The Events of 1964 and 1965

Despite the Civil Rights Acts of 1957 and 1964, black voter participation did not substantively increase. In Dallas County, Alabama, of which Selma is the county seat, there were 29,500 voting age individuals in 1961 of which 14,500 persons were white and 15,000 were black. 156 blacks had succeeded in both registering to vote and remaining on the roles. The Justice Department's voting discrimination suit languished for four years in the federal courts and even when it was won, discrimination, in the form of extensive and complicated literacy tests, closing of registrar's offices, and slow processing of applications continued unabated. In Mississippi, despite years of registration efforts, the "Freedom Summer" voter registration campaign of 1964, and national outrage at the murder of three students attempting to register voters, registration remained at only 6.4%. H. R. Rep. 439, 89th Congress First Session, reprinted in 1965 U.S. Code Cong. & Admin. News pp. 2441-2442.

During the summer of 1964, the Mississippi Freedom Democratic Party ran a parallel election for delegates to the National Convention in which blacks, who wished to affiliate with the Democratic Party, could participate. When the Freedom

Democrats arrived at the Convention, their every move was followed and reported by the FBI, their phones were tapped and, after contentious hearings, they were ousted from the floor of the Convention.[9] In Selma, in early 1965, Dr. King sought to overcome the resistance and inertia of the legal process by direct action. "Bloody Sunday", the March 7th police assault on demonstrators seeking to dramatize the denial of the right to vote, left 18 individuals hospitalized with serious injuries. Subsequently, the Reverend James L. Reeb who had come to Selma to protest, was set upon and beaten to death. These events formed the backdrop for President Johnson's extraordinary appearance, one week after Bloody Sunday, before a joint session of Congress to introduce the Voting Rights Act. He spoke of Selma as a turning point in "man's unending search for freedom":

> At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Ala. There, long-suffering men and women peacefully protested the denial of their rights as Americans. Many were brutally assaulted. One good man--a man of God--was killed . . . Our mission is at once the oldest and most basic of this country: to right wrong, to do justice, to serve man . . . Many of the issues of civil rights are very complex and difficult. But about this there can and should be no argument. Every American citizen must have an equal right to vote. There is no reason which can excuse the denial of this right. There is no duty which weigh more heavily upon us than the duty we have to insure that right . . . Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No

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[9] O'Reilly, Kenneth, Racial Matters, pp. 186-190, the Free Press, New York, 1989.

> law that we now have on the books--and I have helped to put three of them there--can insure the right to vote when local officials are determined to deny it. . . This bill will strike down restrictions to voting in all elections--federal, state and local--which have been used to deny Negroes the right to vote. . . this legislation will insure that properly registered individuals are not prohibited from voting.

House Document No. 117, 89th Congress, 1st Session.

As noted in *Morse*, in order to "avoid a dispute" about Congressional intent, Rep. Jonathan Bingham requested that the bill be clarified to insure that voting for party offices was specifically covered. *Morse*, 517 U.S. at 208,236. He cited the White Primary Cases and:

> The events of 1964. . . The State of Mississippi selected its Democratic National Convention delegates through a process that started at the precinct level meeting. Negroes were barred from these meetings. Alabama required those who wished to run in the Democratic Primary to secure the necessary forms by applying to party officials. . . . . In State after State party officials either control, materially influence, or directly affect the process by which a candidate for nomination or election can achieve his goal.

Hearings Before the Committee on the Judiciary, H.R. 6400, Testimony March 25, 1965 pp. 456-457.

According to Representative Bingham, the method chosen of reaching the problem was to add to the bill's definition of vote:

> the concept that voting for party office was covered as well as voting for public office. The Judiciary Committee report made clear that the intention was to

include within the protections of the bill election of such party officers as delegates to national conventions.

Congressional Record July 9, 1965 p. 16273.

The Judiciary Committee Report Representative Bingham references states:

> Clause 1 of this subsection contains a definition of the term "vote "for purposes of all sections of this act. The definition makes it clear that the act extends to all elections–federal state, local, primary, special or general–and to all actions connected with registration, voting or having a ballot counted in such elections. The definition also states that the act applies to elections for "party offices."

H..R. No 439, 1965 U.S. Code Cong. & Admin. News p. 2464.

These definitions are presently set forth at 42 U.S.C. 1973*l*(c)(1) which states, in pertinent part:

> The terms" vote" or "voting" shall include *all action to make a vote effective in any primary, special or general election,* including, but not limited to . . . casting a ballot and having such ballot counted properly and included in the appropriate totals cast *with respect to candidates for public or party office.*

Under 42 U.S.C. 1973(c) § 5 preclearance is required for:

> any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting.

The Attorney General's Regulations for administering § 5 also mandate that the types of voting changes at issue in this case, involving who may be candidates for delegate or President of the United States and how votes will be counted at elections for these

offices and the effect of those votes, must be precleared by the Attorney General:

> A change affecting voting effected by a political party is subject to the preclearance requirement a) if the change relates to a public electoral function of the party and b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or subunit subject to the preclearance requirement of Section 5. For example, changes with respect to recruitment of party members, the conduct of political campaigns and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions or party officials are chosen are subject to the preclearance requirement of Section 5.

28 C.F.R. § 51.7

II. NEITHER THE SOURCE OF THE CHANGE IN VOTING PROCEDURE NOR THE FIRST AMENDMENT ABSOLVES THE DEMOCRATIC PARTY OF ITS OBLIGATION TO COMPLY WITH THE VOTING RIGHTS ACT

Both *Morse* and this Court's decision in *Presley v. Ewotah*, 502 U.S. 491, 502-503 (1992) make very clear that each of the changes in delegate election and candidate criteria in this case require § 5 preclearance. Each involves changes in delegate and presidential candidacy requirements and qualifications, changes involving the manner of voting, and changes involving the composition of the electorate which may vote. *Morse*, 517 U.S. pp. 228-229 & F.N. 38 and pp. 238-239. Arizona's change of its primary election procedure required pre-clearance irrespective of whether it bore the imprimatur of a state court decision. *NAACP v. Hampton County Election Com'n*, 470 U.S. 166, 178 (1985). See also *Allen v. State Board of Elections*, 393 U.S. 544, 569-570 (1969), Attorney General's Regulations, 28

C.F.R. § 51.12 and this Court's summary affirmance in *Grenada, Miss. v. Hubbard*, 67 USLW 3374 (1998).

Lopez v. Monterey County, 119 S.Ct. 693 (1999) also makes very clear that where, as here, the Democratic National Committee dictates to state parties in covered jurisdictions what rules they must follow in national convention delegate and presidential nominating elections in covered jurisdictions, either the Democratic National Committee or the state parties must pre-clear the changes ordered.

If the district court had addressed the straightforward question before it, and determined whether these changes in voting procedures required preclearance, it would have had to answer this question in the affirmative. Under Section 5, the Democratic Party would then be required to prove that these rules changes did not have the purpose and would not have the effect of discriminating against minority voters, making this case to either the Attorney General or the District of Columbia District Court. Rather than addressing this issue squarely, however, the district court, at the behest of the Democratic Party undertook to re-examine the constitutionality of the Voting Rights Act based upon the Party's *conclusory* claim that the state parties' associational privileges would be violated by the application of Section 5. The district court concluded that to read the Act as applying to the presidential nominating and delegate election procedures at issue in this case, would render it unconstitutional and therefore, the state parties were immune from preclearing these changes. (J.S. App. pp. 12a-16a).

In reaching this decision, the district court concluded that the framework of the White Primary Cases did not apply because appellants constitutional claims were dismissed. (J.S. App. p.15a) This reasoning is plainly erroneous. See *Morse*, 517 U.S. at pp. 192-193 and 204-205. The Voting Rights Act covers all changes in voting procedures, no matter how minor or neutral on their face. As explained by former Solicitor General and constitutional scholar Archibold Cox:

> Congress has the power to outlaw all voting arrangements that result in a denial or abridgement of the right to vote *even though not all such arrangements are unconstitutional, because this is a means of preventing their use as engines of purposive and therefore unconstitutional racial discrimination.*

1982 U.S. Cong. & Admin. News p. 218.

The reason for placing the burden of proof on those performing functions "integral to the electoral process" in covered jurisdictions was to end "evasion" once and for all and to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. at 328, *Morse*, 517 U.S. at 213.

The Democratic Party appellees have never demonstrated that submitting these rules and procedures for pre-clearance would excessively burden their associational rights and the court below never asked them to. In fact, the Virginia Democrats precleared the original rules for their elections prior to the DNC's imposition of the changed requirements and political parties have, on numerous occasions in the past, precleared electoral rules with the Attorney General. *Morse,* 517 U.S. at 200 & F.N. 18.

The changes in voting and candidacy procedures in this case are neither minor nor neutral nor are they in the nature of protected "party rules" as the district court opinion erroneously states. (J.S. App. pp. 9a, 14a). The Attorney General's Regulations 28 C.F.R. §51.7 distinguish the party candidacy and voting requirements at issue here which require preclearance from such matters as party recruitment and party platforms which do not. See also *Smith v. Allright*, 321 U.S. at 664-655.

In holding that the party's claimed right to define itself trumps the Voting Rights Act, the district court effectively nullifies the holdings in the White Primary Cases . The district court's decision does not explain, nor could it explain the difference between the Democratic Party's legal claim to be able to nominate its candidate in a "privatized" National Convention exempt from the results of votes cast by Democratic voters who

cast their votes pursuant to state law, and the "private club"processes of the South Carolina Democratic Party or the Jaybird Association in Texas. Under the district court's decision, the "real votes" can once again be counted in the "private club", rendering meaningless the votes which were cast in publicly sponsored primaries or convention processes. There is also no meaningful distinction between the Democratic Party's current claim to an absolute right to exclude, to cancel the votes of minority voters and annul minority candidacies that the party establishment views as subversive, and the "special qualifications" the South Carolina Democratic Party formerly imposed on minority candidates and voters. The expressed purpose of the Jaybird Club was "good government", which in the view of its members meant "all white" government. The only means to preserve this viewpoint was to exclude blacks from effective participation in Ft. Bend County's electoral process--preventing any candidate, white or black, from being elected in Ft. Bend County whoopposed discrimination based on race.

Under traditional First Amendment analysis the Democratic Party's claim and the district court's decision fare no better. The district court made no effort to balance the First Amendment right claimed by the Party against the "state interest" extant in the Voting Rights Act. If this balancing is undertaken, it is immediately apparent that the substantial state interest implicated in the Voting Rights Act is distinguishable from the state interests advanced in the First Amendment associational cases upon which the district court and the Democratic Party rely. *See Democratic Party of U.S. v. Wisconsin*, 450 U.S. 125-126 (1981), *Cousins v. Wigoda*, 419 U.S. 477, 491 (1975), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-223 (1986). In sustaining the Voting Rights Act against a constitutional challenge based upon intrusion of the rights of the states under the Constitution, this Court held that the extraordinary significance of the Act trumped important concerns for federalism. See *Lopez v. Monterey County*, 119 S.Ct. 693 at 703. The district court's discussion of the Act as only a statute of "some importance" in applying the First Amendment's balancing test, clearly fails to

appreciate both the history of the Act and this Court's holdings. (J.S. App. p.14a)

The district court also made no meaningful attempt to balance the First Amendment Rights of the minority appellants who were stripped of party office by the Democratic Party, denied their rights of candidacy and denied the right to vote and to have those votes effectively counted, against the associational claims of the Democratic Party. The absolute First Amendment claim made by the party and sustained by the District Court:

> fails when the interests of "the party (as defined by the party leadership) and the interests of its "adherents" diverge. In such a case, interference with the freedom of a party might be necessary to protect the freedom of its adherents. Moreover, the Court has held that "the right to associate for expressive purposes is not . . . absolute. Infringement on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associative freedom.

Note, *Harvard Law Review* Vol 110:135, 1996, pp. 356-366, discussing *Morse.*

This Court has repeatedly noted that the rights of voters and the rights of candidates do not lend themselves to neat separation. *Bullock v. Carter*, 405 U.S. 134 (1972); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1987). Because candidacy restrictions have the "potential to undermine the effectiveness of voters who wish to elect particular candidates, they are required to be precleared. *Allen v. State Board of Elections*, 393 U.S. at 570. In this case, that potential was realized. It is noteworthy that the modern Democratic Party, which aspires to a centrist platform which some of characterized as little different than the Republican Party and which functions as an established national institution and receives massive public funding, has few of the qualities of selectivity, intimacy, privacy, or small size characteristic of a genuinely private association. It also lacks the

clearly defined ideological and political platforms which this Court has found to implicate the highest levels of concern for freedom of association and freedom of speech. See *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987). See also, *Democratic Party of United States v. Wisconsin*, 450 U.S. 107, 131-133; Tribe, *American Constitutional Law* 1988 Edition, §13-22, p. 1115; 1996 Democratic Party Delegate Selection Rule 4.

None of the precedents relied upon by the appellees and the district court support the "absolute" associational privilege for the Democratic Party set forth in the district court's opinion. Each reserves the ability of the courts to intervene when the Party acts in a discriminatory or illegal fashion. See, e.g. *Tashjian v Republican Party*, 479 U.S. at 224 & F.N. 12b, *Cousins v. Wigoda*, 419 U.S. at 477. Rotunda, "Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda," *Texas Law Review*, Vol. 58:873 pp. 935, 945-951 (1975).

In conducting its balancing test, the district court also ignored the deference which is due to the Attorney General's Regulations which themselves balance political party associational claims against the requirements of the Voting Rights Act. *Lopez* , 119 S. Ct. 693 at 702. Under those Regulations the voting changes at issue in this case are required to be pre-cleared.

III. Conclusion

The decision of the district court represents a substantial departure from well settled precedent concerning the scope of §5 of the Voting Rights Act. Accordingly this Court should summarily reverse or note probable jurisdiction.

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Lyndon H. LaRouche, Jr., et al.,	
Plaintiffs,	
v.	Civil Action No. 96-1816 (DBS,TPJ,HHK)
Donald L. Fowler, individually and as Chairman, Democratic National Committee, et al.,	(Three-Judge Court)
Defendants.	

ORDER

The motions to dismiss came on to be heard before a three-judge court of the United States District Court of the District of Columbia and was argued on August 16, 1999.

On consideration whereof for the reasons set forth more fully in the opinion issued on even date, it is this 1st day of November, 1999, herewith

ORDERED that defendants' motion to dismiss is granted.

David B. Sentelle
United States Circuit Judge

Thomas P. Jackson
United States Circuit Judge

Henry H. Kennedy, Jr.
United States Circuit Judge

UNITED STATES DISTRICT COURT
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Defendants.	

OPINION ON MOTION TO DISMISS

Per curiam: This three-judge court was convened to consider a Voting Rights Act case arising out of Lyndon LaRouche's unsuccessful campaign to capture the Democratic Party's 1996 nomination for President of the United States. The suit was originally filed on August 2, 1996, and also contained additional constitutional claims. The application for a three-judge court was denied and the entire complaint dismissed pursuant to Fed. R. Civ. P. 12(b)(6). The court of appeals then affirmed in part and remanded in part, which required the assembly of a three-judge court on the claims under the Act. *See LaRouche v. Fowler*, 152 F.3d 974, 998 (D.C. Cir. 1998). We now consider the remaining portions of defendants' motions to dismiss. We conclude that the defendant Democratic National Party is not a covered jurisdiction under the Act, and that the defendant state parties

are not required to request preclearance of national party rules. We therefore grant the motion.

I.

The focus of this action is on Democratic National Committee ("DNC") rules which essentially extinguished Lyndon LaRouche's chances of winning the Democratic presidential nomination in 1996. The facts are already detailed extensively in the opinion of the court of appeals. *See id.* at 975-77. We restate the relevant facts here.

LaRouche first announced his presidential bid on August 7, 1993. On March 12, 1994, the DNC adopted Delegate Selection Rules for their 1996 convention. Rule 11(K) stated:

> For purposes of these rules, a Democratic candidate for President must be registered to vote, must be a declared Democrat, and must, as determined by the Chairman of the Democratic National Committee, have established a bona fide record of public service, accomplishment, public writings and/or public statements affirmatively demonstrating that he or she has the interests, welfare and success of the Democratic Party of the United States at heart and will participate in the Convention in good faith.

The DNC also promulgated its "Call to the 1996 Democratic National Convention," in which Article IV defined a presidential candidate as:

> any person who, as determined by the National Chairperson of the Democratic National Committee, has accrued delegates in the nominating process and plans to seek the nomination, has established substantial support for his or her nomination as the Democratic candidate for the Office of the President of the United States, is a bona fide Democrat whose record of public service, accomplishment, public

writings and/or public statements affirmatively demonstrates that he or she is faithful to the interests, welfare and success of the Democratic Party of the United States, and will participate in the Convention in good faith.

LaRouche qualified for a position on the Democratic party ballot in a number of states by the spring of 1996. But on January 5, 1996, DNC Chairman Donald L. Fowler sent a letter to the chairpersons of all state Democratic Party organizations. Under Rule 11(K) and Article IV (the "Rules"), Fowler stated in relevant part that LaRouche was "not a bona fide Democrat," as shown by his "beliefs which are explicitly racist and anti-Semitic, and otherwise utterly contrary to the fundamental beliefs ... of the Democratic Party...." Thus, LaRouche was "not to be considered a qualified candidate," and "state parties ... should disregard any votes that might be cast for Mr. Larouche [sic], should not allocate delegate positions to Mr. Larouche and should not recognize the selection of delegates pledged to him at any stage of the Delegate Selection Process." The letter further stated that "Mr. Larouche will not be entitled to have his name placed in nomination for the office of President at the 1996 Democratic National Convention."

LaRouche was not excluded from any primary ballots as a result of this letter. But, he alleges that he received enough votes to receive representation in Democratic nominating activities in Louisiana, Virginia, Texas, and Arizona, and the District of Columbia. Due to the Fowler letter, however, each of these jurisdictions denied LaRouche such representation.

LaRouche and his supporters then filed this suit against Fowler, the DNC, and the state Democratic parties and various party officials of each of the above-mentioned states (the "state defendants"). He alleged that the Democratic Party nominating procedures which undermined his campaign had been adopted unlawfully because they were not pre-cleared under the Voting Rights Act (the "Act"), 42 U.S.C. § 1973 *et seq.*, and also violated his Constitutional rights under 42 U.S.C. § 1983. He also requested the appointment of a three judge court.

The one-judge district court denied the application and dismissed the entire action. The court of appeals affirmed the dismissal of some claims. First, claims against the District of Columbia Democratic Party were dismissed because it is not a "covered jurisdiction" subject to preclearance under the Act. *See LaRouche*, 152 F.3d at 986. Second, the court of appeals affirmed the dismissal of LaRouche's § 1983 claims. *See id.* at 998.

The appeals court remanded the Voting Rights Act claims against Fowler, the DNC, and the state defendants. It noted that a single judge may dismiss claims under the Act only if the plaintiffs challenge is "wholly insubstantial" or "obviously frivolous." *Id.* at 982-83. Because the extent to which political party activities are subject to the Act is not clear after *Morse v. Republican Party*, 517 U.S. 186 (1996), and although that case might be distinguishable, the court was unable to say that the plaintiffs' claims failed to meet that standard. *See id.* at 986. Therefore, it remanded the cause to this three-judge court to consider the motion to dismiss.

II.

Congress adopted the Voting Rights Act in 1965 to remedy racial discrimination in voting. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Section 5 of the Act bars covered "state[s] or political subdivision[s]" from "enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1964, or two specified later dates, unless they have been precleared with the Attorney General or approved by the United States District Court for the District of Columbia. 42 U.S.C. § 1973c (1994). "Vote" or "voting" is defined as "all action necessary to make a vote effective in any primary, special, or general election" for "candidates for public or party office." 42 U.S.C. § 19731(c)(1) (1994). Under § 4 of the Act, the Attorney General is assigned the task of identifying covered jurisdictions; that is, each "State or ... political subdivision of a state" in which racial discrimination in voting has occurred. 42 U.S.C. § 1973b(b) (1994). The Justice Department's list includes the states at issue here. *See*

28 C.F.R. pt. 51, app. (1998). The list does not include the DNC.

III. Application of "Delegation Theory" to the DNC

We first consider whether the Act can be construed to apply to Chairman Fowler and the DNC. We admit that the issue is not as clear cut as simply pointing out that the DNC is not listed as a covered jurisdiction. This is because in *Morse* the Court held that a political party, though not listed as a covered jurisdiction, can be subjected to the preclearance requirements of the Act.

In *Morse*, the Court ruled that the Virginia Republican Party was required to preclear the adoption of a party convention fee because the party was acting under power delegated by the state of Virginia, a covered jurisdiction. *See Morse*, 517 U.S. at 203 (Stevens, J., announcing the judgment of the Court, joined by Ginsburg, J.). The Court's ruling produced no majority opinion, and is thus difficult to apply as binding precedent. Five opinions were delivered: Justice Stevens announced the judgment of the Court in an opinion joined by Justice Ginsburg, *see id.* at 190; Justice Breyer concurred in the judgment in an opinion joined by Justices O'Connor and Souter, *see id.* at 235; Justice Scalia filed a dissent joined by Justice Thomas, *see id.* at 241; Justice Kennedy filed a dissent joined by Chief Justice Rehnquist, *see id.* at 247; Justice Thomas also filed a dissent joined by Chief Justice Rehnquist and Justice Scalia, and by Justice Kennedy in part, *see id.* at 253. Despite this split of opinion, *Morse* is the primary case regarding the application of § 5 to political parties and we must consider its application not only to the DNC, but also to the state defendants which are discussed below. We do so mindful that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, `the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds....'" *Marks v. United States*, 430 U.S. 188, 193(1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). This inquiry can be quite difficult, and "is workable ... only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950

F.2d 771, 781 (D.C. Cir. 1991) (en banc). This is not the case in *Morse*.

Justice Stevens declared in *Morse* that "political parties are covered under § 5 ... insofar as the Party exercises delegated power over the electoral process...." 517 U.S. at 224 (Stevens, J.). A state makes such a delegation when it automatically allows the nominees of the two major political parties to appear on the general election ballot. *See id.* at 195-97 (Stevens, J.). Justice Breyer, concurring in the judgment, thought it unlikely that Congress intended to exclude all political party activity in light of the history surrounding the Act. *See id.* at 235-37 (Breyer, J.); *LaRouche*, 152 F.3d at 984. But he noted that the Court need not "decide just which party nominating convention practices fall within the scope of the Act." *Morse*, 517 U.S. at 238 (Breyer, J.). The First Amendment right of association, he thought, was not sufficiently implicated by a convention fee, and such concerns could be left for a later day. *See id.* at 239-40 (Breyer, J.). Justice Stevens also agreed that the First Amendment did not prevent enforcement of § 5 under the facts. *See id.* at 228-29 (Stevens, J.). Thus, while the two opinions share common elements, it is not apparent that one fits neatly into the other, so as to provide clear guidance as to the "narrower" holding of the court. Therefore, lower courts are left without clear instruction.

Based on the undefined contours of the delegation of state power theory followed by *Morse*, the court of appeals left to our consideration whether, under *Morse*, the preclearance obligation of the statute extended to the DNC and its internal party rules. *See LaRouche*, 152 F.3d at 986. It could be argued that the DNC has received the delegated authority of covered jurisdictions by the states' allowing major party candidates to automatically appear on the general election ballot. However, we hold that the theory of delegation used in *Morse* does not extend that far.

A recent Court decision handed down after the court of appeals remand guides us. *See Lopez v. Monterey County*, 119 S. Ct. 693 (1999). In *Lopez*, Monterey County, California, was sued for a failure to preclear election changes mandated by California law. Although Monterey County is a covered jurisdiction, the state of California is not. *See id.* at 696. Thus, the issue presented was "whether a covered jurisdiction

'seek[s] to administer' a voting change when, without exercising any independent discretion, the jurisdiction implements a change required by the superior law of a noncovered State." *Id.* at 701. The Court answered that question in the affirmative and held that Monterey County was required to seek preclearance to administer the election changes. *See id.* at 705.

While not directly on point, the reasoning of *Lopez* is helpful here. The DNC is not a covered jurisdiction. But regardless of whether the state parties are covered, the DNC need not preclear changes for the same reason that California does not need to preclear changes, i.e., neither California nor the DNC are covered jurisdictions, although their political subunits may be. *Morse* may stand for the proposition that a state political party can at times act as a delegatee of power from its resident state, but it would be inconsistent with *Lopez* to say that a national political party can be delegatee of power from any of its covered political subunits.

Although each state may, in a manner of speaking, "delegate" authority to a national party by allowing its candidate automatic ballot access, the national party does not act solely pursuant to that delegation. The DNC's decisions affect the Democratic Party in all states. No one state controls the method in which the Democratic Party chooses candidates. Cf *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (agreeing that it would be "an obviously intolerable result" if each of the fifty states could establish delegate qualifications without regard to national party policies) (quoting *Wigoda v. Cousins*, 342 F. Supp. 82, 86 (N.D. Ill. 1972)). For example, if the Democratic Party of Maine, an uncovered jurisdiction, adopts a voting qualification, it need not apply for preclearance. Yet, the Maine party's ability to do this by implementing a national rule would be curtailed if the DNC is a covered jurisdiction. This is so because if the DNC had to preclear all changes that it wants all state parties to follow, even in uncovered jurisdictions, the consequence is that all state Democratic parties are affected-a result inconsistent with *Lopez*. There has never been a suggestion in *Lopez* or any other decision that any state with covered political subdivisions must preclear all changes; instead, only covered jurisdictions must apply in order to implement changes.

Furthermore, the statute itself defines its coverage in terms of states and political subdivisions of states. If we divorce coverage from geographical considerations, a political entity could not readily determine whether to apply for preclearance. As in *Lopez*, it is logical to require preclearance of the organization that is resident in the covered jurisdiction, but absolve the parent entity. Covered jurisdictions remain covered, and uncovered ones remain uncovered consistent with general application of § 5. In *United States v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110, 120 (1978), the Supreme Court recognized that § 4(a) of the Act "appl[ies] throughout each designated jurisdiction," reasoning that "[s]ince the States or political subdivisions 'with respect to which' § 4(a)'s duties apply are entire territories . . . , § 5 must, it would seem, apply territorially as well." *Id.* at 126. Even so, today we conclude that application of the preclearance requirement to a national political party is not consistent with the geographic scheme of the statute.

Therefore, we hold that the DNC is not a covered jurisdiction. Its internal party rules are not subject to preclearance under the Act and applicable Justice Department regulations.

IV. State Parties

A. Personal Jurisdiction and Venue

Before deciding whether the preclearance requirements apply to the state defendants, we briefly address their contentions that this court lacks personal jurisdiction over them and that venue is improper.

To assert personal jurisdiction over a nonresident defendant, a federal court must satisfy the Due Process Clause of the Fifth Amendment. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). We need not conduct a separate inquiry under the long-arm statute of the District of Columbia because, for our purposes here, that statute extends to the same constitutional limits. *See United States v. Ferrara*, 54 F.3d 825, 828 (D.C. Cir. 1995); *Hummel v. Koehler*, 458 A.2d 1187, 1190 (D.C. 1983). Accordingly, we look for "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations and internal quotes omitted). We also inquire as to whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Here, LaRouche alleges that the DNC conspired and acted in concert with the state defendants in violation of the Voting Rights Act. These actions, many of which are alleged to have occurred in the District of Columbia, resulted in the issuance and administration of the Rules which were used to defeat LaRouche's candidacy. The complaint also mentions or alludes to numerous contacts between the state defendants and the District of Columbia regarding events at issue in this case. The defendant's dispute on this issue amount to little more than a plaintive plea that the complaint is inartfully drawn. We find that this court has personal jurisdiction over the state defendants.

The defendant's improper venue claim may also be disposed of. It is true that the Voting Rights Act venue provision only applies to states and their subdivisions, *see* 42 U.S.C. § 1973(c) (1994), but that is not the only statute we look to. The complaint makes allegations which satisfy the general venue provisions of 28 U.S.C. § 1391(b) (1994). For example, the fact that the defendant DNC is a resident of the District of Columbia makes venue in this court proper.

B. Right of Association Limitations

We must now ask whether the state parties were required to seek preclearance before administering the DNC rules. Perhaps there is some support for an affirmative answer in *Morse* and *Lopez*. As in *Morse*, we are dealing with state political parties that receive some delegated authority from their respective states. *See LaRouche*, 152 F.3d at 985. And although the state parties did not promulgate the rules at issue, the administration of such rules arguably could require preclearance under *Lopez*. Thus, the issue becomes whether the rules at issue here are of the type that the Supreme Court intended to cover in *Morse*. In holding the DNC not to be a covered jurisdiction above, we did not need to determine which party practices were subject to preclearance. *Morse*,

however, did rule that some state parties practices, such as the fee requirement in *Morse* itself{ can be subject to preclearance by state parties resident in covered jurisdictions. We must consider now "which party nominating convention practices fall within the scope of the Act." *Morse*, 517 U.S. at 238 (Breyer, J.).

One of the few guideposts that *Morse* provides for us in this determination is that associational rights must be considered. Indeed, all nine justices in *Morse* recognized that the First Amendment right of association is implicated by the application of the Act to political parties. Justice Stevens, announcing the decision, recognized that "the right of association of members of a political party 'is a basic constitutional freedom,' "but did not consider "hypothetical cases unrelated to the facts of this case [that] might implicate First Amendment concerns that would foreclose application of the preclearance requirement." *Id.* at 228. Justice Breyer, in concurring, stated that the fee requirement "lies within the Act, and well outside the area of greatest `associational' concern," but that First Amendment questions are "difficult ones," which "are properly left for a case that squarely presents them." *Id.* at 239. Justice Scalia, in dissent, noted that the interpretation of the Act is "inextricably bound up" with "the First Amendment freedom of political association." *Id.* at 241. Justice Kennedy argued that "[t]he First Amendment questions presented by governmental intrusion into political party functions are a further reason for caution before we adopt a blanket rule that preclearance is required on the theory that when Congress used the word `State' it also meant 'political party.'" *Id.* at 250. Justice Thomas, also dissenting, noted that "[s]evere interference with protected rights of political association 'may [only] be sustained if the [government] demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms,' and that "it is not equally obvious to me that § 5, as interpreted today, would survive a First Amendment challenge." *Id.* at 285 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). Thus, while the five minority opinions of Morse differ as to the implication of the right of association on the facts of that case, all agree that application of the preclearance requirements to political party actions implicates those rights. We must now determine

whether the more direct application sought by plaintiff in this case implicates those rights to an impermissible extent. It does.

The Supreme Court recognized First Amendment associational rights in political parties at least as early as *Ray v. Blair*, 343 U.S. 214 (1952). In *Blair*, the Court considered an attempt by the state of Alabama to require a state party chairman to certify a candidate for presidential elector in the face of the candidate's refusal to pledge his support to the nominees of the national convention of that party for president and vice president of the United States. The Supreme Court reversed a state court decision upholding the state's power to require the certification, recognizing the right of a party's governing body to "protect[] a party from intrusion by those with adverse political principles." *Id.* at 221-22. Subsequently, in *Williams v. Rhodes*, 393 U.S. 23 (1968), the High Court invalidated Ohio election laws imposing formidable hurdles to the formation of third parties declaring that Ohio had not stated a sufficient state interest to 'justify the very severe restrictions on voting and associational rights which [it] ha[d] imposed." *Id.* at 32. Backing down the states' attempted imposition of stringent standards on the formation of the political party, the Court referred to the "immediate and crippling impact on the basic constitutional rights involved ..." *Id.* at 33.

In *Cousins v. Wigoda*, 419 U.S. 477 (1974), the Court reviewed a state court order barring a national party from seating the delegates chosen by its local subunits and ordering the seating of delegates chosen under procedures governed by the state election code. In reversing the state court decision, the Supreme Court recognized that "the National Democratic Party and its adherents enjoy a constitutionally protected right of political association," not to be infringed by state interference, absent a compelling state interest. *Id.* at 487. Likewise, in *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981), the High Court considered the validity of a state supreme court decision holding that the National Democratic Party must recognize delegates chosen to its national convention through an open primary required by state statute rather than through a procedure mandated by the party's own delegate selection rules requiring a closed system in which "only those who are

willing to affiliate publicly with the Democratic party may participate..." *Id.* at 109. In upholding the party's right to use its own selection methods, the Supreme Court recognized that "the freedom to associate for the common advancement of political beliefs necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Id.* at 122 (internal quotation marks and citation omitted). Similarly, in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the state attempted to impose a closed primary system on a party desiring to open its primaries to independent voters. Again, the Court held that the restrictions "impermissibly burden [ed] the rights of the Party and its members protected by the First and Fourteenth Amendment." *Id.* at 229. The Court has subsequently hewed to the same line in cases raising various state restrictions on the associational rights of political parties. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224-25 (1989) (holding that California ban on primary endorsements "suffocates" freedom of association, and that laws regulating party governing bodies unjustifiably burden strong associational rights); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (holding that Minnesota anti-fusion ballot provision does not severely burden a party's associational rights, although a party has a right to select its own candidate); see also *Duke v. Massey*, 87 F.3d 1226, 1234 (11th Cir. 1996) ("The Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs.").

In short, the Supreme Court has consistently held that political party membership and governance implicate "core associational activities" constitutionally protected from government interference absent sufficient justification. *Timmons*, 520 U.S. at 360. Here, we have the state parties administering internal national party rules governing who, as a Democrat, can be a candidate for president. This would appear to fall within the core associational rights of a political party. *See, e.g, Democratic Party of the United States*, 450 U.S. at 121-22 & n.22 (stating that the freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only") (citing Laurence Tribe, American

Constitutional Law 791(1978) ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.")); see also *LaRouche*, 152 F.3d at 996 ("[T]he Party's ability to define who is a 'bona fide Democrat' is nothing less than the Party's ability to define itself."). Indeed, Justice Breyer intimated in his opinion in Morse that party activities such as the adoption of resolutions or platforms regarding party philosophy and rules governing internal operation, "are very likely not subject to preclearance." *Morse*, 517 U.S. at 238 (Breyer, J.) (citing *Presley v. Etowah County Comm'n*, 502 U.S. 491, 502-03 (1992)).

Pitted against this core constitutional right is the Voting Rights Act preclearance requirement, intended to enforce the guarantees of the Fifteenth Amendment. In a normal case, § 5 can cover candidacy requirements and qualifications. *See Presley*, 502 U.S. at 502 (citing *NAACP v. Hampton County Elections Comm'n,* 470 U.S. 166 (1985); *Hadnott v. Amos*, 394 U.S. 358 (1969); *Dougherty County Bd. of Ed. v. White*, 439 U.S. 32 (1978)). But while the Act is unarguably a statute of importance, see, e.g, *South Carolina v. Katzenbach*, 383 U.S. at 308-09, it should not be read to extend coverage that would interfere with core associational rights; specifically here, internal national party rules as followed by state parties in a covered jurisdiction.

In reaching this conclusion, we are guided by the principle that we should construe statutes so as to avoid constitutional questions. To hold as LaRouche seeks would unnecessarily implicate First Amendment rights. By holding that the preclearance requirement does not apply to the political party rules at issue here, we avoid the implication of the First Amendment rights of association. When faced with two constructions of a statute, it is "our plain duty to adopt that construction which will save the statute from constitutional infirmity." *United States ex. rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366,408 (1909); *see also Edward J. DeBartolo Corp. v. Florida GulfCoast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such

construction is plainly contrary to the intent of Congress."). The prevailing Justices in Morse did not find this rule of construction implicated on the facts of that case, but held that the practice challenged was "well outside the area of greatest 'associational' concern." *Morse*, 517 U.S. at 239 (Breyer, J.). Here, however, we have a core right before us. We must invoke the rule.

We point out that this case does not present the direct clash of a Fifteenth Amendment violation and a First Amendment right. LaRouche's constitutional claim under the Fifteenth Amendment was dismissed by the one-judge district court and affirmed by the court of appeals. *See LaRouche*, 152 F.3d at 987, 998. Thus, this case is not governed by the White Primary Cases, in which the Court struck down practices excluding minority voters from the Texas Democratic Party nomination process as violative of the Fifteenth and Fourteenth Amendments. *See Nixon v. Herndon*, 273 U.S. 536 (1927); *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith V. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461(1953). The history of the White Primary Cases supports the proposition that Congress intended the Voting Rights Act to have a broad scope, *see Morse*, 517 U.S. at 210-12 (Stevens, J.), but we cannot "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp.*, 485 U.S. at 575. The Court of Appeals observed that nothing in the historical context of the Voting Rights Act evidences "a concern that a covered jurisdiction would to try achieve [unconstitutional] end[s] by delegating authority to a national party, or that a national party would attempt to impose racially discriminatory rules on a covered jurisdiction." *LaRouche*, 152 F.3d at 986. Although it may be true that "the right of associative freedom would not provide a defense to many practices condemned by § 5," *see Morse*, 517 U.S. at 229 n.38 (Stevens, J.), we only consider a national party rule concerning core associational freedoms formulated by an uncovered entity, which does not implicate suspect classifications, and which is administered without alteration by covered jurisdictions. Heeding Justice Breyer's concerns in *Morse*, we need not go further. *See Morse*, 517 U.S. at 238-40 (Breyer, J.).

In the wake of *Morse*, we know that some "nominating convention practices" of political parties may fall within the Act's preclearance requirements. We also know that this inquiry is impacted by the associational rights at issue. The *Morse* Court did not need to determine the "hypothetical concerns" that later cases such as this one would raise, *id.* at 229 (Stevens, J.), but we must confront the reach of the federal government into an area long recognized as involving the fundamental political rights of the nation's citizens. We hold that under the facts of this case, the First Amendment rights of the political party and its members preclude a reading of the preclearance requirements which would allow their application to the state defendants. The motion to dismiss is granted.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 14, 1997 Decided August 28, 1998

No. 96-7191

Lyndon H. LaRouche, Jr., et al.,
Appellants

v.

Donald L. Fowler, individually and as Chairman
Democratic National Committee, et al.,
Appellees

Appeal from the United States District Court
for the District of Columbia
(No. 96cv01816)

James F. Schoener argued the cause for appellants, with whom *Theo Mitchell, Odin P. Anderson, James E. Wilson, Jr.* and *Nina J. Ginsberg* were on the briefs.

John C. Keeney, Jr. argued the cause for appellees, with whom *Charles A. Rothfeld, Mary Eva Candon, John Hardin Young, Steven Ross* and *Richard A. Halloran* were on the brief. *Scott M. Deutchman* entered an appearance.

Before: SILBERMAN, SENTELLE and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: This case arises out of Lyndon H. LaRouche, Jr.'s unsuccessful quest for the Democratic Party's 1996 nomination for President. The Party's application of certain of its internal rules deprived LaRouche of two delegates to the 1996 Democratic National Convention.

LaRouche contends that application of those rules violated the Voting Rights Act, 42 U.S.C. §§ 1971, 1973-1973bb, because the Party did not submit them for judicial or administrative preclearance. He also contends that application of the rules violated his rights under the Constitution. With a limited exception, we conclude that we are without jurisdiction to decide LaRouche's Voting Rights Act claims and therefore remand them for the convening of a three-judge district court. We affirm the dismissal of LaRouche's constitutional claims.

I

LaRouche declared his candidacy for the Democratic Party's 1996 nomination for President on August 7, 1993. On March 12, 1994, the Democratic National Committee (DNC) adopted its Delegate Selection Rules for the 1996 Democratic National Convention. Rule 11(K) provided:

> For purposes of these rules, a Democratic candidate for President must be registered to vote, must be a declared Democrat, and must, as determined by the Chairman of the Democratic National Committee, have established a bona fide record of public service, accomplishment, public writings and/or public statements affirmatively demonstrating that he or she has the interests, welfare and success of the Democratic Party of the United States at heart and will participate in the Convention in good faith.

In January 1995, the DNC adopted the "Call to the 1996 Democratic National Convention," which in Article VI defined "presidential candidate" as:

> any person who, as determined by the National Chair-person of the Democratic National Committee, has accrued delegates in the nominating process and plans to seek the nomination, has established substantial support for his or her nomination as the Democratic candidate for the Office of the President of the

> United States, is a bona fide Democrat whose record of public service, accomplishment, public writings and/or public statements affirmatively demonstrates that he or she is faithful to the interests, welfare and success of the Democratic Party of the United States, and will participate in the Convention in good faith.

By the spring of 1996, LaRouche had qualified for a position on the Democratic Party primary ballot in numerous states. On January 5, 1996, however, before the first primary was held, DNC Chairman Donald L. Fowler issued a letter addressed to the chairpersons of all state Democratic Party organizations. Expressly exercising his authority under Rule 11(K) and Article VI (hereinafter "Rule 11(K)" or "the Rules"), Fowler determined that:

> Lyndon Larouche [sic] is not a bona fide Democrat and does not possess a record affirmatively demonstrating that he is faithful to, or has at heart, the interests, welfare and success of the Democratic Party of the United States. This determination is based on Mr. Larouche's expressed political beliefs, including beliefs which are explicitly racist and anti-Semitic, and otherwise utterly contrary to the fundamental beliefs ... of the Democratic Party and ... on his past activities including exploitation of and defrauding contributors and voters.

Following this determination, Fowler instructed the state parties that:

> Accordingly, Mr. Larouche [sic] is not to be considered a qualified candidate for nomination of the Democratic Party for President.... Therefore, state parties ... should disregard any votes that might be cast for Mr. Larouche, should not allocate delegate positions to Mr. Larouche and should not recognize the selection of delegates pledged to him at any stage of the Delegate Selection Process.

> Further, Mr. Larouche will not be entitled to have his name placed in nomination for the office of President at the 1996 Democratic National Convention. No certification of a delegate pledged to [him] will be accepted by the Secretary of the DNC....

Neither the Rules nor the Fowler letter were submitted to the Attorney General or a district court for preclearance under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c.

LaRouche was not excluded from any primary ballot because of Fowler's letter. He appeared on Democratic Party primary ballots in twenty-six states, receiving a total of 597,853 votes. He alleges[1] that under the otherwise operative party rules, he won sufficient support in Louisiana's Democratic Party primary and in Virginia's Democratic Party caucuses to be entitled to one national convention delegate from each state. The respective state party chairpersons, however, carried out the instructions in the Fowler letter and ruled that LaRouche was not entitled to the two delegates. In addition, LaRouche asserts that local precinct delegates pledged to him were excluded from Texas Democratic Party caucuses. And although Arizona's Secretary of State certified LaRouche's name for that State's "presidential preference election," the Arizona State Democratic Party filed a lawsuit in state court that resulted in the cancellation of that election.[2] Finally, LaRouche asserts that the District of Columbia

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[1] Because the district court dismissed LaRouche's complaint for failure to state a claim, we must deem the allegations of the complaint to be true. *See Gosby v. Osser*, 409 U.S. 512, 521 n.7 (1973).

[2] Arizona's state run "presidential preference election" had been scheduled for February 27, 1996, while DNC rules precluded participation in primaries before March 5. The Democrats in Arizona accordingly planned their own party-run primary for March 9 and sued to block the state-rum primary. Despite LaRouche's objections, an Arizona state court blocked the state primary, noting in the process that the DNC had found LaRouche not to be a qualified candidate for the Democratic Party Nomination. *See Arizona State Democratic Comm. v. Secretary of State*, No. CV96-00909, slip op. at 5 (Ariz. Super. Ct., Maricopa Co. Feb. 1, 1996) (Joint Appendiz ("J.A.") at 346).

Democratic Party refused to accept the candidacy of delegates pledged to him.

On August 2, 1996, less than one month before the Democratic National Convention, LaRouche, would-be LaRouche delegates, and LaRouche supporters who either voted for him in primaries and caucuses or assertedly were barred from doing so (collectively referred to in this opinion as "LaRouche") filed suit in the District Court for the District of Columbia against Fowler, the DNC, and state Democratic Party officials and organizations in Arizona, the District of Columbia, Louisiana, Texas, and Virginia (collectively referred to in this opinion as "the DNC"). The suit alleged, inter alia, the failure to pre-clear changes in voting procedures in violation of the Voting Rights Act, as well as the violation of rights guaranteed by the Constitution and 42 U.S.C. § 1983. LaRouche sought compensatory and punitive damages, declarations that the DNC rules and Fowler's actions were void for lack of preclearance and were unconstitutional, and injunctions ordering defendants to seat his delegates at the convention and prohibiting the DNC from reenacting Rule 11(K) or any similar rule for future conventions. LaRouche also sought the appointment of a threejudge district court to hear the case, pursuant to section 5 of the Voting Rights Act and 28 U.S.C. § 2284.

On August 15, 1996, the district court denied the application for a three-judge court and dismissed the entire complaint, with prejudice as to all defendants, pursuant to Fed. R. Civ. P. 12(b)(6). The court ruled that "not only has the U.S. Supreme Court held that the national political parties possess the right under the First Amendment to `identify' those who constitute their `association' and to `limit the association to those people only,' the only defendants able to afford the relief sought, viz., Chairman Fowler and the DNC, are neither `covered jurisdictions' nor agents thereof under ... the Voting Rights Act and, thus, not subject to its `preclearance' requirements."

II

Before reaching the merits of LaRouche's claims, we must first consider defendants' contention that those claims are moot because the 1996 election is over. LaRouche does not

dispute the mootness of his specific request for an injunction ordering the seating of his delegates at the 1996 Convention, but contends that his underlying causes of action continue to present a live controversy. He is plainly correct as to his claims under the Constitution and § 1983, because his request for damages on those claims saves them "from the bar of mootness." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8, 56 L. Ed. 2d 30, 98 S. Ct. 1554 (1978). Although the DNC contends that a claim for damages can keep a controversy alive only if that claim "is not so insubstantial or so clearly foreclosed by prior decisions that the case may not proceed," Appellees' Br. at 14 (quoting *Memphis Light*, 436 U.S. at 9), as the discussion in Part V of this opinion makes clear, those claims are neither insubstantial nor foreclosed by prior decisions.[3]

We also agree with LaRouche that both these and his other claims are saved from mootness because the situation is "capable of repetition, yet evading review." This exception to the mootness doctrine applies if: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration[;] and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again...." *Spencer v. Kemna*, 523 U.S. 1, 140 L. Ed. 2d 43, 118 S. Ct. 978, 988 (1998) (citation and internal quotation omitted); *see Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990). Challenges to rules governing elections are the archetypal cases for application of this exception. *See, e.g., Norman v. Reed*, 502 U.S. 279, 287-88, 116 L. Ed. 2d 711, 112 S. Ct. 698 (1992); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5, 36 L. Ed. 2d 1, 93 S. Ct. 1245 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 816, 23 L. Ed. 2d 1, 89 S. Ct. 1493 (1969); *see also Branch v. FCC*, 262 U.S. App. D.C. 310, 824

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[3] Although in Part V we assume without deciding that LaRouche is correct in his contention that the conduct he challenges constitutes state action, Part V.A makes clear that contention is neither "insubstantial" nor "clearly foreclosed by prior decisions." We also note that the quoted phrase from *Memphis Light* appears to describe the test for subject matter jurisdiction rather than a requirement for avoiding mootness. *Cf. Bell v. Hood*, 327 U.S. 678, 682-83 (1946) (holding that claims may be dismissed for want of jurisdiction if "wholly insubstantial and frivolous").

F.2d 37, 41 n.2 (D.C. Cir. 1987) ("Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters `capable of repetition, yet evading review.' "); *Stewart v. Taylor*, 104 F.3d 965, 969 (7th Cir. 1997) ("Elections are routinely too short in duration to be fully litigated, and there is a reasonable expectation that the same party would be subjected to the same action again."); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 18 (1st Cir. 1996).

Under the "evading review" prong of this exception, we consider "whether the challenged activity is *by its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live." *Conyers v. Reagan*, 246 U.S. App. D.C. 371, 765 F.2d 1124, 1128 (D.C. Cir. 1985) (internal quotations omitted). The DNC contends that LaRouche had ample time to seek judicial review because Rule 11(K) was adopted in March 1994, over two years before the convention. In support, it cites our statement in *National Black Police Ass'n v. District of Columbia* that "`both Supreme Court and circuit precedent hold that orders of less than two years' duration ordinarily evade review.'" 323 U.S. App. D.C. 292, 108 F.3d 346, 351 (D.C. Cir. 1997) (quoting *Burlington N.R.R. Co. v. Surface Transp. Bd.*, 316 U.S. App. D.C. 103, 75 F.3d 685, 690 (D.C. Cir. 1996)). This two-year mark, however, serves only as a rule-of-thumb; we did not intend it to exclude periods of slightly greater duration, as in this case.

Moreover, the date of the adoption of Rule 11(K) is not the critical date. Indeed, had LaRouche sued as soon as the DNC adopted the rule, his claims might well have been declared unripe, as the rule did not mention LaRouche at all. The Party gave no indication that it would apply the rule to LaRouche until January 1996, just seven months prior to the convention, a time certainly too short to permit district court challenge and appellate review. *See Burlington N.R.R. Co.*, 75 F.3d at 690.

LaRouche's challenge also satisfies the "capable of repetition" prong of the exception, as "there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again...." *Spencer*, 118 S. Ct. at 988 (citation and internal quotation omitted). LaRouche has sought the Democratic Party's presidential nomination in the past five

elections. He received over half a million votes during the 1996 primaries. And on July 18, 1997, he announced his "intention to campaign for the Year 2000 Democratic Party presidential nomination." Addendum to Appellants' Br. at 57.

Defendants contend that it is "pure speculation" whether the DNC will adopt a rule similar to Rule 11(K) for the 2000 Convention, or whether the DNC chair will apply any such rule to LaRouche. But the Party "has not disavowed" that it will do so. *Cf. Morse v. Republican Party*, 517 U.S. 186, 116 S. Ct. 1186, 1213 n.48, 134 L. Ed. 2d 347 (1996) (Stevens, J.) (fact that Virginia Republican Party "ha[d] not disavowed" practice of imposing a delegate filing fee for its nominating convention was important factor in concluding that controversy was capable of repetition, yet evading review). Moreover, given the party-defining importance the DNC's briefs attach to Rule 11(K), there is at least a "reasonable expectation" that it or something close to it will be in place for the next convention. And given the vehemence of DNC Chairman Fowler's attack on LaRouche's credentials as a "bona fide Democrat," there certainly is a "reasonable expectation" that future Party chairs will see matters the same way.

Finally, we reject defendants' argument that *Keane v. National Democratic Party*, 155 U.S. App. D.C. 18, 475 F.2d 1287 (D.C. Cir. 1973), establishes that the "capable of repetition, yet evading review" exception does not apply to "a post-convention ... challenge to credentials of party-selected delegates to a Democratic National Convention." Appellees' Br. at 10. *Keane* did conclude that by 1973, a challenge to the exclusion of delegates from the 1972 Democratic National Convention was moot to the extent it involved the right to be seated at the convention (although not moot to the extent it involved the right of competing delegates to post-convention representation in national party matters). *See Keane*, 475 F.2d at 1288. But while the dissenting judge protested that the case was capable of repetition, the majority did not mention the exception at all. Indeed, nothing in the majority opinion suggests that the delegates in *Keane* could have demonstrated, as LaRouche can, that they reasonably expected to be subjected to the same action again.

Accordingly, we conclude that *Keane* does not preclude application of the capable of repetition exception to the facts

of this case. To the contrary, because "there [is] every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the ... issues that arose" in 1996, we reject defendants' effort to raise the bar of mootness. *See Norman*, 502 U.S. at 288 (holding that Illinois court's decision voiding use of party label in past election was capable of repetition, yet evading review).

III

We turn next to defendants' contention that challenges to party delegate-selection rules constitute nonjusticiable political questions. Although this court twice before has rejected that contention, *see Bode v. National Democratic Party*, 146 U.S. App. D.C. 373, 452 F.2d 1302, 1305 (D.C. Cir. 1971); *Georgia v. National Democratic Party*, 145 U.S. App. D.C. 102, 447 F.2d 1271, 1276-78 (D.C. Cir. 1971), the DNC argues that *O'Brien v. Brown*, 409 U.S. 1, 34 L. Ed. 2d 1, 92 S. Ct. 2718 (1972), subsequently established that all disputes over internal party rules are nonjusticiable. But *O'Brien* did not set forth such a broad rule; indeed, *O'Brien* did not even decide the applicability of the nonjusticiability doctrine to the case then before the Court.

In *O'Brien*, the Supreme Court considered challenges to judgments of this court passing upon the constitutionality of delegate-seating determinations made by the Democratic Party's Credentials Committee in advance of the 1972 national convention. The Court noted that "these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties," that "highly important questions are presented concerning justiciability," and that it "entertained grave doubts as to the action taken by the Court of Appeals." *Id.* at 4-5. As the dispute had not reached the Supreme Court until the eve of the convention, however, the Court pronounced itself "unwilling to undertake final resolution of the important constitutional questions presented ... under the circumstances and time pressures surrounding" the appeals, *id.*, and instead simply granted stays of the judgments pending consideration of the petitions for certiorari.

The defendants also contend that, since *O'Brien*, the Supreme Court has consistently held "disputes over internal party rules to be nonjusticiable." Appellees' Br. at 22. In fact, the Court has never so held. The first case defendants cite for this proposition is *Cousins v. Wigoda*, which did hold that "the National Democratic Party and its adherents enjoy a constitutionally protected right of political association." 419 U.S. 477, 487, 95 S. Ct. 541, 42 L. Ed. 2d 595 (1975). But that did not end the inquiry. The Court went on to determine whether Illinois had a sufficiently "compelling interest" to justify abridgment of the Party's constitutional rights, *id.* at 489-91, and expressly "intimated no views" as to "whether or to what extent principles of the political question doctrine counsel against judicial intervention" into "decisions of a national political party in the area of delegate selection," *id.* at 483 n.4.[4]

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[4] *Cousins*, *O'Brien*, and *Keane* all related to a dispute over the seating of Illinois delegates at the 1972 convention. In the Illinois state primary, voters elected a slate of uncommitted delegates, including Chicago alderman Paul Wigoda, who were associated with Chicago Mayor Richard J. Daley. A "reform" slate, including William Cousins, successfully petitioned the Party's Credentials Committee to be seated in their stead. *See generally* Petitioners' Opening Brief at 5-9, *Cousins v. Wigoda*, 419 U.S. 477, 42 L. Ed. 2d 595, 95 S. Ct. 541 (1975) (No. 73-1106). The Wigoda delegates, in turn, sued to reverse the Committee's decision.

In *Brown v. O'Brien*, 152 U.S. App. D.C. 157, 469 F.2d 563 (D.C. Cir. 1972), this court rejected the Wigoda delegates' complaint and enjoined them from further prosecuting an Illinois state court action they had brought against their rivals. *See* 469 F.2d at 571-75; *see also infra* note 20. In *O'Brien v. Brown*, the Supreme Court stayed this court's judgment. *See* 409 U.S. at 5. After the convention, the Court granted the petition for certiorari, vacated the judgment, and remanded for consideration of whether the case had become moot. *See Keane v. National Democratic Party*, 409 U.S. 816, 34 L. Ed. 2d 73, 93 S. Ct. 67 (1972). We held the case moot insofar as it concerned the seating of delegates at the convention, and affirmed dismissal of the Wigoda delegates' suit. *See Keane*, 475 F.2d at 1288.

Meanwhile, one day after the Supreme Court's stay of our initial judgment, and two days before the convention, the Illinois circuit court had ruled in favor of the Wigoda delegates and enjoined the Cousins delegates from participating in the convention. *See Cousins*, 419 U.S. at 480. The convention nevertheless seated the Cousins delegates, who were subsequently threatened with criminal contempt for violating the state

Much the same is true of the other Supreme Court decisions cited by defendants, including *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 67 L. Ed. 2d 82, 101 S. Ct. 1010 (1981), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989), and *Tashjian v. Republican Party*, 479 U.S. 208, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986). As defendants contend, and as we will discuss in Part V below, these cases do hold that "a State, or a court, may not constitutionally substitute its own judgment for that of [a] Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution." *La Follette*, 450 U.S. at 123-24. Yet, as in *Cousins*, in each of these cases the Court went on to decide the dispute on the merits. And in *La Follette*, although the Court said that "the stringency, and wisdom, of membership requirements is for the association and its members to decide--not the courts," it immediately qualified that statement by adding: "*so long as those requirements are otherwise constitutionally permissible.*" *Id.* at 123 n.25 (emphasis added).[5]

The allegations made by LaRouche do not come within the basic criteria for political questions. For example, "[a] controversy is non-justiciable--i.e., involves a political question-where there is `a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

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court injunction. *See id.* at 481. In *Cousins*, the Supreme Court reversed the decision of the Illinois court in favor of the Wigoda delegates. *See id.* at 491.

[5] In *Wymbs v. Republican State Executive Committee*, also cited by defendants, the Eleventh Circuit held nonjusticiable a challenge to Florida Republican Party rules for selection of delegates to the 1980 Republican National Convention. *See* 719 F.2d 1072 (11th Cir. 1983). The court's holding was based in part on the fact that, in contrast to this case, plaintiffs had failed to join the Party's national committee as a defendant. *See id.* at 1081, 1086; *see also Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 838, 841 (4th Cir. 1987) (deciding that a constitutional challenge to 1984 Democratic National Convention rules, as implemented in Maryland, was "not justiciable *because it is lacking in merit*") (emphasis added).

manageable standards for resolving it....'" *Nixon v. United States*, 506 U.S. 224, 228, 122 L. Ed. 2d 1, 113 S. Ct. 732 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962)). The first category of political questions is plainly absent here, as no other branch of the government is involved. The important question is whether this case falls within the second category--that is, whether there are judicially discoverable and manageable standards for resolving it.

Contrary to defendants' description, this case does not come to us merely as a dispute over whether LaRouche qualifies for delegates under internal party rules. Rather, LaRouche contends that the Party's internal rules violate the Voting Rights Act. In so doing, he alleges the violation of an express and measurable statutory duty requiring covered "states or political subdivisions" to preclear "any voting qualification ... or procedure with respect to voting different from that [previously] in force or effect...." 42 U.S.C. § 1973c. Although it may be difficult to determine whether Rule 11(K) comes within the Act's terms, courts do not lack judicially discoverable and manageable standards for making that determination. The application of the Voting Rights Act's language to the facts of the Party's delegate-selection rules is a typical judicial exercise. As we will discuss in detail below, it is an exercise the Supreme Court itself undertook just two Terms ago--without raising the specter of a political question. *See Morse*, 517 U.S. 186, 116 S. Ct. 1186, 134 L. Ed. 2d 347.

Nor do the plaintiffs' constitutional (and § 1983) claims raise a political question. Those claims arise principally under the First Amendment and under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Supreme Court repeatedly has adjudicated election disputes arising under those amendments, *see, e.g., Eu*, 489 U.S. at 222-33; *La Follette*, 450 U.S. at 120-26; *Cousins*, 419 U.S. at 487-91, thus rendering "the interpretation of [these] provisions of the Constitution ... well within the competence of the Judiciary," *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 458, 118 L. Ed. 2d 87, 112 S. Ct. 1415 (1992) (referring to "the apportionment provisions of the Constitution"). *See Williams v. Rhodes*, 393 U.S. 23, 28, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968) (rejecting claim that challenge to state election law was nonjusticiable political question). Although

defendants seek to distinguish the election cases as involving "state action," while contending that this case involves nothing more than the decisions of a private political party, determining which of those two descriptions is legally correct is part of deciding whether the DNC's actions violate the Constitution. And "that determination is a decision on the merits that reflects the exercise of judicial review, rather than the abstention from judicial review that would be appropriate in the case of a true political question." *Montana*, 503 U.S. at 458.

IV

We next consider LaRouche's challenge to the district judge's determination that Rule 11(K) and the Fowler letter did not violate the Voting Rights Act. We conclude that both this court and the single-judge district court below largely lack jurisdiction to decide the merits of this issue because the question properly belongs before a three-judge district court. *See Goosby v. Osser*, 409 U.S. 512, 522 n.8, 35 L. Ed. 2d 36, 93 S. Ct. 854 (1973).

A

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, states that "any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." Section 2284(b)(1), in turn, provides that the district judge to whom a request for a three-judge court is made "shall, unless he determines that three judges are not required," notify the chief judge of the circuit to convene a three-judge court. Appeals from decisions of three-judge courts under section 5 must be made directly to the Supreme Court. *See* 42 U.S.C. § 1973c; *Allen v. State Bd. of Elections*, 393 U.S. 544, 561-62, 22 L. Ed. 2d 1, 89 S. Ct. 817 (1969). Courts of appeals, however, have jurisdiction to determine whether a single district judge properly declined to convene a threejudge court. *See Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 100 & n.19, 42 L. Ed. 2d 249, 95 S. Ct. 289 (1974); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16, 8 L. Ed. 2d 794, 82 S. Ct. 1294 (1962); H.R. REP. NO. 94-1379, at 7 (1976).

It has long been the rule that single district judges may not determine the merits of claims alleging the failure to preclear voting changes under section 5. *See, e.g., Backus v. Spears*, 677 F.2d 397, 400 (4th Cir. 1982); *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5th Cir. 1979); *cf. Goosby*, 409 U.S. at 518 (regarding three-judge court actions under former 28 U.S.C. § 2281). Although § 2284 does provide that a single judge may "determine[ ] that three judges are not required," 28 U.S.C. § 2284(b)(1), a single judge may do so only if a plaintiff's challenge is "wholly insubstantial," League of United Latin Am. Citizens v. Texas, 113 F.3d 53, 55 (5th Cir. 1997) (quoting *Goosby*, 409 U.S. at 518). *See also Backus*, 677 F.2d at 400. The Supreme Court made clear just how minimal a showing is required to establish substantiality in *Goosby v. Osser*:

> "Insubstantiality" for this purpose has been equated with such concepts as "essentially fictitious," "wholly insubstantial," "obviously frivolous," and "obviously with-out merit." The limiting words "wholly" and "obviously" have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial.... A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.

409 U.S. at 518 (citations and some internal quotations omitted).[6]

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[6] *Goosby* involved a challenge to state election laws under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, which at the time had to be made before a three-judge district court pursuant to 28 U.S.C. § 2281. Congress repealed 28 U.S.C. § 2281 in 1976, returning

Although the DNC contends LaRouche's challenge fails even under the *Goosby* standard, it also contends that standard was altered when Congress amended § 2284 in 1976. It points out that the pre-1976 version provided that "[a] single judge shall not ... dismiss the action," 28 U.S.C. § 2284(5) (1970) (repealed 1976), while the current version does not. The DNC concludes that Congress must have meant, by this deletion, to permit a single judge to grant a motion to dismiss.

No court has noticed the language change pointed to by the DNC or interpreted it as having such import. *See League of United Latin Am. Citizens*, 113 F.3d at 55 (continuing to apply *Goosby* test); *Armour v. Ohio*, 925 F.2d 987, 989 (6th Cir. 1991) (same); *Backus*, 677 F.2d at 400 (same). There is good reason for this. First, the legislative history suggests that Congress did not intend the change to have any substantive effect.[7] Second, the section of the statute in which the quoted provision appeared applied only to the powers available to an individual judge who was a member of a threejudge court, not to the powers of a single judge before such a court had been convened. *See* 28 U.S.C. § 2284(5) (1970) (repealed 1976). Third, at the same time Congress deleted the bar against a single member of a three-judge court alone "dismiss[ing an]

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jurisdiction over suits to enjoin state statutes on constitutional grounds to single district judges. *See* Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119. The courts uniformly have applied *Goosby*'s "wholly insubstantial" standard to requests for three-judge courts under section 5 of the Voting Rights Act. *See, e.g., League of United Latin Am. Citizens*, 113 F.3d at 55; *Saint Landry Parish*, 601 F.2d at 863 n.6; *see also Backus*, 677 F.2d at 400. Indeed, section 5 refers to the same statutory section that § 2281 did for the procedures governing its three-judge courts, providing, as did § 2281, that actions shall be "determined by a [district] court of three judges [under] section 2284." 42 U.S.C. § 1973c; *see* 28 U.S.C. § 2281 (1970) (repealed 1976).

[7] Although the legislative history does not address this change specifically, both the Senate and House Reports explain the reasons for other changes in the section and then note that "the other powers here given the single judge, or expressly denied him, are similar to those stated in" the predecessor version of § 2284. S. REP. NO. 94-204, at 13 (1975); H.R. REP. NO. 94-1379, at 7. The legislative history also states that the "bill in no way affects the right to a three-judge court where otherwise specifically mandated by statute, such as in ... the Voting Rights Act of 1965...." H.R. REP. NO. 94-1379, at 2; *see* S. REP. NO. 94-204, at 2.

action," it inserted a new prohibition barring such a single judge from "entering judgment on the merits," 28 U.S.C. § 2284(b)(3) (1994). Hence, at most the change merely clarified that an individual member of a three-judge court has no more power to decide a case on the merits than a single judge has under *Goosby*: neither may enter judgment on the merits of a claim requiring action by a three-judge court, i.e., a claim that is not "wholly insubstantial" or "obviously frivolous."

B

We turn, then, to the DNC's fall-back position: that even under *Goosby*, LaRouche's section 5 claim must be dismissed because that section's preclearance requirements "obviously" do not apply to defendants' actions. In so doing, we say only enough to determine whether LaRouche's claims are "obviously frivolous" or "wholly insubstantial," and not to intimate a final view as to their merits.

The purpose of the Voting Rights Act was to remedy "racial discrimination in voting ... in areas where such discrimination had been most flagrant." Morse, 116 S. Ct. at 1192 (Stevens, J.). To that end, section 5 bars certain covered "states or political subdivisions" from "enacting or seeking to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in effect on November 1, 1964, or two specified later dates, unless they have been precleared by the Attorney General or approved by the United States District Court for the District of Columbia. 42 U.S.C. § 1973c; *see Morse*, 116 S. Ct. at 1193 (Stevens, J.).[8] Section 14 defines "vote" or "voting" as "all action necessary to make a vote effective in any primary, special, or general election" for "candidates for public *or party office*. " 42 U.S.C. § 1973 l (c)(1) (emphasis added).

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[8] The standard for preclearance by a district court is a showing that the qualification or prerequisite "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color...." 42 U.S.C. § 1973c. The Justice Department's regulations provide that "the Attorney General shall make the same determination that would be made by the [district] court in an action for a declaratory judgment." 28 C.F.R. § 51.52.

Section 4 of the Act authorizes the Attorney General to identify each "State or ... political subdivision of a state" in which racial discrimination in voting had occurred, pursuant to a formula set out in the section. 42 U.S.C. § 1973b(b); *see Morse*, 116 S. Ct. at 1192. The states and political subdivisions so identified are the "covered jurisdictions" of the Act, 28 C.F.R. § 51.4(c), and are listed in the Justice Department's regulations. *See id.* pt. 51, app. The list includes nine states and parts of seven others. Arizona, Louisiana, Texas, and Virginia are all covered jurisdictions; the District of Columbia is not. *See id.*

The leading case regarding the application of section 5 to political parties is *Morse v. Republican Party*, 517 U.S. 186, 116 S. Ct. 1186, 134 L. Ed. 2d 347 (1996). In *Morse*, the Supreme Court held that the Virginia Republican Party's imposition of a registration fee on those who wished to be delegates to the Party's nominating convention for its U.S. Senate candidate was subject to preclearance under section 5. Justice Stevens announced the judgment of the Court in an opinion joined by Justice Ginsburg. In his view, "political parties are covered under § 5 ... insofar as the Party exercises delegated power over the electoral process," 116 S. Ct. at 1208--that is, power "'explicitly or implicitly granted by a covered jurisdiction,'" 116 S. Ct. at 1193 (quoting 28 C.F.R. § 51.7). Justice Stevens found Virginia to have made such a delegation because, under the state's Electoral Code, "the nominees of the two major political parties shall automatically appear on the general election ballot," in contrast to independent candidates who have to "demonstrate their support with a nominating petition." *Id.* at 1194. Virginia also reserved the top two ballot positions for the major parties, leaving independents with lower listings. *See id.* at 1195. The consequence of this "dual regime," *id.* at 1194, Justice Stevens said, was that the State had delegated to the Party "the power to determine part of the field of candidates from which the voters must choose. Correspondingly, when Virginia incorporates the Party's selection, it 'endorses, adopts and enforces' the delegate qualifications set by the Party for the right to choose that nominee." *Id.* at 1195 (quoting *Smith v. Allwright*, 321 U.S. 649, 664, 88 L. Ed. 987, 64 S. Ct. 757 (1944)).

Justice Breyer, writing for himself and Justices O'Connor and Souter, concurred in the judgment. *See* 116 S. Ct. at 1213-16. His opinion emphasized the historical concerns that led to the passage of the Voting Rights Act, as exemplified by the Court's White Primary Cases, *see id.* at 1213-14--concerns that Justice Stevens stressed as well, *see* 116 S. Ct. at 1202-04 & n.27. In the first of the White Primary Cases, *Nixon v. Herndon*, 273 U.S. 536, 540-41, 71 L. Ed. 759, 47 S. Ct. 446 (1927), the Supreme Court struck down, as a violation of the Fourteenth Amendment, a Texas statute barring nonwhites like plaintiff L.A. Nixon from voting in Democratic primaries. In response, the Texas legislature authorized the executive committees of political parties to prescribe their own voter qualifications, and the state Democratic Party adopted a rule limiting its primaries to white Democrats. Nixon, once again barred from voting, challenged the Party's action, which the Court held to be state action invalid under the Fourteenth Amendment. *See Nixon v. Condon*, 286 U.S. 73, 89, 76 L. Ed. 984, 52 S. Ct. 484 (1932). The Party then implemented the same policy, albeit without statutory direction, by adopting a resolution at a state convention restricting party membership to whites. The Court struck this down as unlawful state action as well, this time under the Fifteenth Amendment, concluding that the Party's resolution constituted state action even though it was not expressly authorized by statute. *See Smith*, 321 U.S. at 664. After *Smith*, the same discriminatory policy continued to be implemented in certain Texas counties by the Jaybird Democratic Association, a voluntary organization that conducted private primary elections, the winners of which with few exceptions ran unopposed in the Democratic Party primary and general elections that followed. Once again, the Court held this election process unconstitutional under the Fifteenth Amendment. *See Terry v. Adams*, 345 U.S. 461, 469-70, 97 L. Ed. 1152, 73 S. Ct. 809 (1953). *See generally Morse*, 116 S. Ct. at 1202-03 (Stevens, J.).

When Congress passed the Voting Rights Act in 1965, Justice Breyer wrote, it well knew the history of the White Primary Cases. It knew that "States had tried to maintain [the] status quo through the `all-white' primary--a tactic that tried to avoid the Fifteenth Amendment by permitting white voters alone to select the `all-white' Democratic Party nominees, who

were then virtually assured of victory in the general election." *Id.* at 1213 (Breyer, J.). In light of this history, Justice Breyer concluded, "to have read this Act as excluding all political party activity would have opened a loophole in the statute the size of a mountain," which it was clear Congress did not intend to do. *Id.; accord id.* at 1204 (Stevens, J.). He cautioned, however, that the Court should decide nothing more than the case before it because of the difficult First Amendment questions raised by applying preclearance procedures in the context of political party conventions. *See id.* at 1215.[9]

The result in *Morse* precludes defendants' contention that because the state party actions of which LaRouche complains occurred at party caucuses or conventions rather than at state-run party primaries, section 5 preclearance "obviously" was not required: *Morse*, too, involved a convention system. *Morse* also poses difficulties for defendants' contention that the claims against Fowler and the DNC are frivolous because neither is listed as a "covered jurisdiction" under section 5: the defendant in *Morse*, the Virginia Republican Party, also was not listed. Nor can we distinguish *Morse* on the ground that it did not concern delegates to a national political convention: as Justice Stevens noted, "the impetus behind the addition of the term `party office' to § 14 was the exclusion of blacks from the Mississippi delegation to the National Democratic Convention in 1964." Id. at 1205-06; *accord id.* at 1214 (Breyer, J.).[10]

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[9] The dissenting justices concluded that the Virginia Republican Party was not a "State or political subdivision" for purposes of section 5, both as a matter of statutory construction, *see id.* at 1222-23 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.), and because of the First Amendment concerns noted by Justice Breyer, *see id.* at 1216 (Scalia, J., dissenting, joined by Thomas, J.) ("We have always treated government assertion of control over the internal affairs of political parties ... as a matter of the utmost constitutional consequence."); *id.* at 1220 (Kennedy, J., dissenting, joined by Rehnquist, C.J.) ("The First Amendment questions presented by governmental intrusion into political party functions are a further reason for caution....").

[10] *See also id.* at 1196 n.18 (Stevens, J.) (noting that in *MacGuire v. Amos*, 343 F. Supp. 119 (M.D. Ala. 1972), "a three judge court held that rules promulgated by the Alabama Democratic and Republican Parties

Finally, defendants contend that *Morse* can be distinguished as a case involving *state* party rules, while the case before us involves *national* party rules. The DNC, they say, was not acting under the authority of a covered jurisdiction when it adopted Rule 11(K); it was acting under its own authority. Likewise, defendants say, the state parties were not acting under state authority when they excluded LaRouche delegates; they were acting under the compulsion of the national party's rules. The problem with labeling this distinction as "obvious" is that a similar one was considered and rejected in *Morse*. Virginia had not required the party to enact a filing fee or even to nominate its candidates in any particular way; those decisions were the party's own. Yet, Justice Stevens found that the freedom the State gave the Party provided no defense. To the contrary, he said, Virginia's grant to the Party of "the right to choose the method of nomination makes the delegation of authority in this case more expansive, not less, for the Party is granted even greater power over the selection of its nominees." *Id.* at 1196.[11]

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governing election of national delegates required preclearance, despite the fact that the rules were not passed by 'the State's legislature or by a political subdivision of the State'").

[11] The DNC notes some tension between the passage quoted in the text and another passage distinguishing *Morse* from the Court's summary affirmance of a three-judge court's decision in *Williams v. Democratic Party*, Civ. No. 16286 (N.D. Ga. Apr. 6, 1972), *aff'd*, 409 U.S. 809 (1972). *Williams* held section 5 inapplicable to a Georgia Democratic Party rule, adopted to comply with a rule promulgated by the National Democratic Party, that governed the selection of delegates to the national convention. Justice Stevens did describe *Williams* as a case where the state "exercised no control over, and played no part in, the state Party's selection of delegates," and therefore where the state had "delegated no authority to the Party to choose the delegates." 116 S. Ct. at 1197; *see id.* at 1197 n.19. On the other hand, Justice Stevens went on to say that at the time of *Williams*, the Attorney General's regulations did not provide "administrative procedures for submission of" rule changes by political parties, *id.* at 1197, and that that ground "would have sufficed for our affirmance," *id.* at 1198 n.21. He also questioned the precedential value of *Williams*, "noting that a summary affirmance by this Court is a 'rather slender reed' on which to rest future decisions." *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983)).

> Justice Stevens summed up his view as follows:
>
> The imposition by an established political party--that is to say, a party authorized by state law to determine the method of selecting its candidates for elective office and also authorized to have those candidates' names automatically appear atop the general election ballot--of a new prerequisite to voting for the party's nominees is subject to § 5's preclearance requirement.

Id. at 1206. In the case at bar, the principal covered jurisdictions at issue also have authorized the state parties to determine the method of selecting their delegates. *See* Ariz. Rev. Stat. § 16-243; La. Rev. Stat. § 18:1280.27; Va. Code § 24.2-508; *cf.* Tex. Elec. Code §§ 191.001, 191.007. And all of the covered jurisdictions have guaranteed the major party candidates--in this case their presidential nominees--automatic positions atop the general election ballot, provided that the parties obtain a minimum level of support in a recent election. See Ariz. Rev. Stat. §§ 16-502, -804; La. Rev. Stat. §§ 18:465, :1254, :1259; Tex. Elec. Code §§ 52.091, 192.031; Va. Code §§ 24.2-101, -542, -543. Accordingly, it can hardly be frivolous to argue from *Morse* that these covered jurisdictions have delegated electoral power to the state parties through the former authorization, and to the National Democratic Party through the latter guarantee.

None of this is to suggest that there may not be good reasons to limit the reach of *Morse*'s "delegation" theory before it touches national party rules. One such reason is reflected in Justice Breyer's caution, acknowledged by Justice Stevens and stressed by the dissenters, that "First Amendment questions about the extent to which the Federal Government, through preclearance procedures, can regulate the workings of a political party convention, are difficult ones." *Morse*, 116 S. Ct. at 1215 (Breyer, J.); *see id.* at 1210-11 (Stevens, J.); *id.* at 1216-18 (Scalia, J., dissenting); *id.* at 1220-21 (Kennedy, J., dissenting).

There is another strong argument for shortening the reach of the delegation theory. It is clear that what drove the majority opinions in *Morse* to extend the Voting Rights Act to state party activities was a concern generated by the historical

background to the passage of the Act. The concern was that if the statute were applied only to direct actions by the covered states, those states might simply delegate their authority to their state parties--just as the Court found had happened in the White Primary Cases--and thus open "a loophole in the statute the size of a mountain." *Id.* at 1213 (Breyer, J.). But nothing in the historical context supports a concern that a covered jurisdiction would try to achieve this end by delegating authority to a *national* party, or that a national party would attempt to impose racially discriminatory rules on a covered jurisdiction. To the contrary, the fact that Congress restricted the application of the Voting Rights Act to specified geographic jurisdictions indicates that it did not have the same concerns regarding actions taken by other jurisdictions.

But the fact that defendants ultimately may be able to distinguish the national party rules at issue here from the state party rule at issue in *Morse* does not mean that a single district judge had the authority to dismiss LaRouche's challenge. No court has yet drawn the distinction considered here, so we can hardly say that "prior decisions inescapably render the claims frivolous...." *Goosby*, 409 U.S. at 518. And while *Morse* plainly does not foreclose the distinction the DNC needs to draw, it surely "leaves ... room for the inference that the questions sought to be raised [by LaRouche] can be the subject of controversy." *Goosby*, 409 U.S. at 518. Accordingly, because we cannot say that plaintiffs' section 5 claims are "essentially fictitious," "wholly insubstantial," or "obviously frivolous," we must remand them for consideration by a three-judge court.[12]

We make one exception to our remand. Included among the defendants in this case are the District of Columbia Democratic Party, the District of Columbia Democratic State

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[12] We do not rule on a series of additional hurdles--not reached by the district court--that LaRouche must clear in order to establish his section 5 claim. For example, LaRouche must establish not only that the DNC Rules and letter were effectively the action of "a State or political subdivision," but also that they amounted to (1) a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," that (2) was "different from that in force or effect" on the dates specified in the statute. 42 U.S.C. § 1973c. LaRouche also must overcome the contention of several defendants that the district court lacks venue and personal jurisdiction over them.

Committee, and the chair of that committee. The District of Columbia is not a covered jurisdiction. *See* 28 C.F.R. pt. 51, app. Nor is there any allegation that the District of Columbia defendants acted with the authority of any covered jurisdiction or that their actions affected voting rights in any covered jurisdiction. Indeed, LaRouche does not even offer a theory for section 5 coverage of the District of Columbia defendants. *See* Reply Br. at 11 (discussing each of the other categories of defendants). Therefore, because the section 5 claims are "wholly insubstantial" with respect to these defendants, the district court had authority to dismiss them and we affirm that dismissal.[13]

V

LaRouche also contends that Rule 11(K) and the Fowler letter deprived plaintiffs of their rights under 42 U.S.C. § 1983 and under the following provisions of the Constitution: Article II, Section 1; the First and Fifth Amendments; the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and the Fifteenth Amendment. These claims, like the Voting Rights Act claim, are certainly

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[13] The Arizona defendants contend that they, too, should be treated differently because the actions LaRouche complains of--the cancellation of the state's presidential preference primary election as to which he had qualified for a ballot position--was accomplished through an Arizona state court order. *See* Appellees' Br. at 27 (citing *Arizona State Democratic Comm. v. Secretary of State*, No. CV 96-00909 (Ariz. Super. Ct., Maricopa Co. Feb. 1, 1996)) (J.A. 342-50); *see also supra* note 2. But the fact that an electoral change was ordered by a state court rather than some other state body does not necessarily take it out of the coverage of section 5, and we therefore cannot conclude that the claim against the Arizona defendants is "obviously frivolous." *Cf. Hathorn v. Lovorn*, 457 U.S. 255, 265-66 n.16, 72 L. Ed. 2d 824, 102 S. Ct. 2421 (1982) ("The presence of a court decree does not exempt the contested change from § 5.... [Section] 5 applies to any change reflecting the policy choices of the elected representatives of the people, even if a judicial decree constrains those choices.") (internal quotation omitted); *Cousins*, 419 U.S. 477, 42 L. Ed. 2d 595, 95 S. Ct. 541 (holding that state court decision interpreting state election law is "state action" for purposes of Fourteenth Amendment); *League of United Latin Am. Citizens*, 113 F.3d at 55 (claim that state court interpretation of previously precleared state law is subject to section 5 preclearance is not "wholly insubstantial" under *Goosby*).

not frivolous. Here, however, the district court's jurisdiction and our standard of review are considerably different. These statutory and constitutional claims do not require a three-judge court for decision. Although they were asserted in the same complaint as the Voting Rights Act claims, a single district judge may decide them and then refer the Voting Rights Act claims to a three-judge court. *See Hagans v. Lavine*, 415 U.S. 528, 543-44, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974); 17 Charles A. Wright et al., Federal Practice and Procedure § 4235 (2d ed. 1988). And the district court's dismissal of these claims under Fed. R. Civ. P. 12(b)(6) is subject to our de novo review. *See Taylor v. FDIC*, 328 U.S. App. D.C. 52, 132 F.3d 753, 761 (D.C. Cir. 1997).

Although LaRouche bases his claims on both § 1983 and the Constitution, we have previously recognized that the case law relating to § 1983 claims, and that relating to claims brought directly under the Constitution, "have been assimilated in most ... respects." *Williams v. Hill*, 316 U.S. App. D.C. 78, 74 F.3d 1339, 1340 (D.C. Cir. 1996) (internal quotation and citation omitted) (ellipsis in original); *see Hafer v. Melo*, 502 U.S. 21, 28, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991); *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 182 n.4, 102 L. Ed. 2d 469, 109 S. Ct. 454 (1988). LaRouche offers no argument for treating the two sets of claims differently and we therefore address them as one.[14]

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[14] LaRouche also asserted claims under 42 U.S.C. § 1985(3) which, he contends, provides a cause of action for conspiracies to violate constitutional rights even if the defendants are not state actors. Since we conclude *infra* that LaRouche's constitutional rights were not violated even if the defendants are considered state actors, § 1985(3) does not advance LaRouche's cause. In any event, the discussion *infra* also demonstrates that plaintiffs can establish neither of the two requirements for a § 1985(3) cause of action: "(1) that some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action, and (2) that the conspiracy aimed at interfering with rights that are protected against private, as well as official, encroachment." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993) (alteration in original) (citations omitted); *see also United Bhd. of Carpenters of America, Local 610 v. Scott*, 463 U.S. 825, 840, 77 L. Ed. 2d 1049, 103 S. Ct. 3352 (1983).

Similarly, LaRouche presents his constitutional claims as an amalgam of the constitutional provisions cited above. He suggests no separate analysis for his First Amendment claims and asserts no difference between the appropriate analyses under the Due Process and Equal Protection Clauses.[15] As the Supreme Court's recent election law cases also treat such claims using a single basic mode of analysis,[16] we will do so

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[15] *But see infra* note 37 (discussing plaintiffs' allusion to procedural due process claim). In the circumstances of this case, plaintiff's reference to the Fifteenth Amendment also adds nothing to the analysis. *Cf. Mobile v. Bolden*, 446 U.S. 55, 65-67, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980) (plurality opinion) (applying similar analysis under both Fifteenth Amendment and Fourteenth Amendment's Equal Protection Clause to claim that at-large system of municipal elections was unconstitutional); *Shaw v. Barr*, 808 F. Supp. 461, 469 n.7 (E.D.N.C. 1992) (same for racial gerrymandering and vote dilution claims), *rev'd on other grounds sub nom. Shaw v. Reno*, 509 U.S. 630, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993).

Nor is anything added by LaRouche's passing reference to Article II, Section 1, of the Constitution, which sets forth the qualifications for President of the United States. Although the DNC rule may have added a qualification for the position of Democratic candidate for President, it did not and was not intended to add a qualification for the Office of President itself any more than would any political party's basic requirement that its nominee be a member of the party. *Cf. Storer v. Brown*, 415 U.S. 724, 746 n.16, 39 L. Ed. 2d 714, 94 S. Ct. 1274 (1974) (state requirement that independent candidate in general election for U.S. Representative be unaffiliated with political party "no more establishes an additional requirement for the office of Representative than the requirement that [an affiliated] candidate win the primary to secure a place on the general ballot"); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835-36, 131 L. Ed. 2d 881, 115 S. Ct. 1842 (1995) (state limitation on access to general election ballot violates congressional Qualifications Clauses where it has the likely effect and sole purpose of creating additional qualification for service in Congress).

[16] *See Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983) ("We base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment."); *see also Norman*, 502 U.S. at 288 n.8; *Republican Party v. Faulkner County*, 49 F.3d 1289, 1293 n.2 (8th Cir. 1995) ("In election cases, equal protection challenges essentially constitute a branch of the associational rights tree.").

here as well. Finally, LaRouche does not distinguish between his rights as a citizen and candidate and the rights of his adherents as citizens, supporters, and voters. The Supreme Court has found these various interests closely tied together and, except as indicated below, we find it unnecessary to disentangle them in order to resolve the merits of LaRouche's challenge.[17]

To succeed on his claims under § 1983 and the Constitution, LaRouche and his adherents must show (1) that the conduct they complain of is a form of "state action,"[18] and (2) that such action deprived them of their constitutional rights. *See Washington v. District of Columbia*, 256 U.S. App. D.C. 84, 802 F.2d 1478, 1480 (D.C. Cir. 1986) (citation omitted); see also Tarkanian, 488 U.S. at 191 (holding that only state action is subject to scrutiny under Due Process Clause of Fourteenth Amendment). We examine these issues in the following sections.

A

The Supreme Court first considered whether political party activity constituted state action in the White Primary Cases described in Part IV above. We construed those cases

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[17] See Anderson, 460 U.S. at 786 (" 'The rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters.' ") (citation omitted); *Bullock v. Carter*, 405 U.S. 134, 143, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972) (same); *Rhodes*, 393 U.S. at 30 ("In the present situation, the state laws place burdens on two different, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters ... to cast their votes effectively.")

[18] For the kind of conduct at issue here, the "under color of state law" standard of § 1983 and the "state action" requirement for a claim under the Constitution are synonymous. *See Hafer*, 502 U.S. at 28 ("In § 1983 actions the statutory requirement of action 'under color of' state law is just as broad as the Fourteenth Amendment's 'state action' requirement."); *Tarkanian*, 488 U.S. at 182 n.4; *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 & n.18, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982) (holding conduct that satisfies "state action" requirement of Fourteenth Amendment also satisfies "under color of state law" requirement, but noting that conduct satisfying latter may sometimes not satisfy former).

broadly in *Georgia v. National Democratic Party*, where we found state action in the formulas the national parties used to allocate delegates to national nominating conventions. *See* 447 F.2d at 1275-76. We viewed the White Primary Cases as mandating that we regard the action of the individual state parties in selecting their convention delegates as state action, and concluded that the same was true when those parties acted through their delegates at the national convention. We also concluded that by placing the nominee of the convention on the ballot, the states "have adopted this narrowing process as a necessary adjunct of their election procedures." *Id.* at 1276. We followed *Georgia* in *Bode v. National Democratic Party*, holding that the Democratic National Committee's adoption of a formula for the allocation of delegates to its 1972 national convention was "tantamount to a decision of the States acting in concert and therefore subject to constitutional standards applicable to state action." 146 U.S. App. D.C. 373, 452 F.2d 1302 at 1304-05.[19]

We initially took the same approach again in *Brown v. O'Brien*, holding that delegate-seating decisions by the Credentials Committee of the 1972 Democractic National Convention constituted state action. We rejected one constitutional attack on such a decision on its merits, but sustained another attack on the ground that the Committee's action was so unfair as to violate the Due Process Clause. *See* 152 U.S. App. D.C. 157, 469 F.2d 563, 565, 569-70 (D.C. Cir. 1972).[20] As noted above, however, the Supreme Court stayed that decision, leaving it to the Convention itself to decide whether to give the litigants the relief they had sought in federal court. Although the Court did not decide the issue, it found that "highly important questions are presented

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[19] Although we found state action, we rejected plaintiffs' challenges in both *Georgia* and *Bode* on the merits. *See Georgia*, 145 U.S. App. D.C. 102, 447 F.2d 1271 at 1280; *Bode*, 452 F.2d at 1310.

[20] *Brown* rejected an attack by Illinois' uncommitted Wigoda delegates on their unseating and enjoined them from further prosecuting an Illinois state court action they had brought against those who challenged their seats before the Credentials Committee. *See* 469 F.2d at 570-75; *supra* note 4. *Brown* upheld an attack by California's McGovern delegates on their unseating and remanded for entry of an order enjoining the Democratic Party from unseating them. *See* 469 F.2d at 566-70.

concerning ... whether the action of the Credentials Committee is state action" and expressed "grave doubts as to the action taken by the Court of Appeals." *O'Brien v. Brown*, 409 U.S. at 4-5. In the same opinion, the Court also seemed to limit the reach of the White Primary Cases, noting that "this is not a case in which claims are made that injury arises from invidious discrimination based on race in a primary contest within a single State." *Id.* at 4 n.1 (citing *Terry*, 345 U.S. 461, and *Smith*, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757).

Three years later, in a case arising out of the same delegate-selection battle, *see supra* note 4, the Supreme Court again sidestepped the question of whether party action was state action. In *Cousins v. Wigoda*, the Court held that an Illinois court had unconstitutionally attempted to enjoin delegates selected pursuant to Democratic Party rules from taking their seats at the 1972 national convention. Because the case arose in the context of a state court injunction, however, the existence of state action was clear and it was "not necessary" to determine "whether the decisions of a national political party in the area of delegate selection constitute state or governmental action." 419 U.S. at 483 n.4 (internal quotation omitted).

When we again considered the question of whether national party action was state action, we found the answer to be "much less clear" than we had in *Georgia* and *Bode*. *See Ripon Soc'y, Inc. v. National Republican Party*, 173 U.S. App. D.C. 350, 525 F.2d 567, 574 (D.C. Cir. 1975) (en banc). *Ripon* involved an equal protection challenge to the delegate-allocation formula adopted by the Republican Party for its 1976 national convention. We noted that *O'Brien* had specifically questioned our finding that decisions by a party credentials committee constituted state action, and also appeared to narrow the White Primary Cases. *See* 525 F.2d at 575. This gave us "reason to question the premise of our first line of reasoning in *Georgia*, i.e., that the elective processes of individual state parties constituted state action for all purposes." *Id.* at 575 n.20. We also noted that "even assuming our finding of state action in *Georgia* rested ... on the ... placement of the candidate's name on the [state] ballot," the Supreme Court's subsequent decisions in "*Moose Lodge* and *Jackson* must still give us pause. Both cases rejected claims of state action based on the award to the defendants of a state

benefit...." *Id.* at 575 n.18.[21] And we pointed out that the "nexus between the states and the delegate-allocation formula is open to question particularly since the Supreme Court has also now held in *Cousins v. Wigoda*, 419 U.S. 477, 42 L. Ed. 2d 595, 95 S. Ct. 541 (1975), that an individual state is without power to interfere with the delegate selection procedures of a national convention." 525 F.2d at 574. In light of these uncertainties, and because it was "clear to us that plaintiffs' case must fail on its merits without regard to whether or not there is state action," we "declined to decide" the state action question. *Id.* at 576.

Unfortunately, the question of whether the delegate or candidate-selection rules of political parties constitute state action has not become any clearer since *Ripon*. Subsequent Supreme Court decisions dealing with party rules all have involved conflicts between those rules and state laws, rather than intra-party disputes like this one. *See, e.g., Eu*, 489 U.S. at 216-19; *Tashjian*, 479 U.S. at 210-13; *La Follette*, 450 U.S. at 109-20. In *Flagg Bros. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978), however, although the Court was not faced with a challenge to party electoral rules,[22] it did in dictum again suggest a narrow view of the White Primary Cases. Then-Justice Rehnquist attributed the Court's finding of state action in the White Primary Cases to a conclusion that the elections in those cases constituted "public functions." *Id.* at 158. A public function, he said, is not simply one "traditionally performed by governments," but rather one "traditionally exclusively reserved to the State." *Id.* at 157-58 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345,

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[21] In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-77, 32 L. Ed. 2d 627, 92 S. Ct. 1965 (1972), the Court held that the state's issuance of a liquor license to a private lodge was insufficient to render the lodge's refusal to serve an African-American "state action." In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974), the Court found that the state's grant of regulated monopoly status to a privately-owned public utility was insufficient to make the utility a state actor.

[22] The challenge in *Flagg Bros.* was to a warehouseman's proposed sale of goods entrusted to him for storage, as permitted by New York law. *See* 436 U.S. 149 at 151-52, 98 S. Ct. 1729, 56 L. Ed. 2d 185.

352, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974)).[23] Moreover, he continued, "[t]he doctrine does not reach to all forms of private political activity, but encompasses only state-regulated elections or elections conducted by organizations which in practice produce `the uncontested choice of public officials.' " 436 U.S. at 158 (quoting *Terry*, 345 U.S. at 484).

If a party must produce the nation's "uncontested choice" for President of the United States to qualify as a state actor, the Democratic (or Republican) Party plainly does not qualify. Nor did the actions of the DNC at issue here involve a "stateregulated election" in the *Flagg Bros.* sense. Although arguably the state parties could have read the Fowler letter as instructing them to keep LaRouche off state primary ballots, there is no allegation that they attempted to do that, and an affidavit filed by the DNC indicates that it did not intend the letter to be read in that way. *See* J.A. 273 (Aff. of Richard Q. Boylan, Director of Party Affairs and Delegate Selection for the DNC). In fact, LaRouche participated in all of the staterun primary elections at issue, and his adherents expressed their support by voting for him. The rub did not come until he wanted to use the results of those state-run primaries to require the Party to accept his convention delegates. At that point, the DNC simply ignored the results of the primaries and selected delegates according to internal party rules.[24]

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[23] The quotation from *Jackson* has been repeated in several subsequent state action cases. *See, e.g., San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987); *Blum v. Yaretsky*, 457 U.S. 991, 1011, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982); *see also Tarkanian*, 488 U.S. at 197 n.18.

[24] This distinguishes the case from the Eleventh Circuit's finding of state action in a decision by Georgia's "presidential candidate selection committee" to delete David Duke's name from the list of potential Republican presidential candidates on the Georgia presidential preference primary ballot. *See Duke v. Cleland*, 5 F.3d 1399, 1404 (11th Cir. 1993). The Georgia Code established the committee, named its members (including the Secretary of State of Georgia and specified state legislative officers), and gave it the power to delete a name from the list if all committee members of the same party as the candidate agreed. *See id.* at 1401-02 & n.1. The Eleventh Circuit's decision involving a similar committee's deletion of Duke's name from the list of candidates for the Florida presidential primary is distinguishable on the same ground. *See Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994).

Nor does a national political convention readily fit the *Flagg Bros.* description of a "public function" as one "traditionally exclusively reserved to the State." Indeed, history is largely to the contrary. *See* V.O. Key, Jr., Politics, Parties and Pressure Groups 475 (1953) (noting that the institution of the convention "evolv[ed] completely outside the Constitution and laws.... [It is] an extraconstitutional, semiprivate gathering"). But see 13 F.3d 398 at 400 ("The national conventions, creatures of party custom, remain beyond state jurisdiction, yet state law often prescribes the methods for the choice of delegates to the convention.") (referring to practice prior to the decisions in *Cousins* and *La Follette*, discussed *infra*).[25]

This brings us back finally to the splintered majority opinions in *Morse*, which appear to revive a considerably more expansive view of state action and the White Primary Cases than that expressed in *Flagg Bros.* As noted above, the opinions of both Justice Stevens and Justice Breyer rested their conclusions that the party was the "state" for purposes of the Voting Rights Act on their reading of the history of the

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[25] The institution of the national nominating convention, which emerged in 1831, could be regarded as taking a step away from state action (at least under certain criteria), as it supplanted nomination by caucuses of each party's members of Congress as well as nomination by state legislatures. *See* Kay, *supra*, at 400-03; Congressional Quarterly, Guide to U.S. Elections 5 (1975). Although conventions were intended as a step toward the selection of nominees by the entire party membership, they often came under the control of party bosses. *See id.* at 404-07. President Harding, for example, reputedly won his party's nomination in the infamous (although possibly apocryphal) "smoke-filled room" at Chicago's Blackstone Hotel in 1920. *See* Edward McChesney Sait, American Parties and Elections 590 n.93 (3d ed. 1942). Although state-run primaries were introduced in the beginning of the 20th Century, it was not until 1972 that the parties chose the majority of their delegates through primaries. *See* Leonard P. Stark, The Presidential Primary and Caucus Schedule: A Role for Federal Regulation, 15 Yale L. & Pol'y Rev. 331, 333 (1996). Credentials challenges have occurred at almost every convention, and the conventions historically have been the judges of the qualifications of their members. *See* Key, *supra*, at 458-59; Congressional Quarterly, *supra*, at 11; *see also O'Brien*, 409 U.S. at 5 ("For nearly a century and a half the national political parties themselves have determined controversies regarding the seating of delegates to their conventions.").

White Primary Cases. Justice Stevens relied particularly on the fact that Virginia reserved the two top positions for the major parties to fill with their nominees, thus delegating to the parties "the power to determine part of the field of candidates from which the voters must choose." *Morse*, 116 S. Ct. at 1195. He essentially rejected *Flagg Bros.*' dictum that, to be classified as a state actor, the party must produce an uncontested choice for the position. "Voting at the nomination stage is protected," Justice Stevens said, "regardless whether it `invariably, sometimes, or never determines the choice of the representative.'" *Id.* at 1205 (quoting *United States v. Classic*, 313 U.S. 299, 318, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941)). And "state delegation of selection powers to two adversaries instead of just one state actor does not preclude a finding of state action." *Id.* at 1208 n.36.[26] The States' authorization to the parties to make their own decisions regarding delegate selection was sufficient, and the absence of "extensive" state regulation of the process was "irrelevant." *Id.* at 1196 n.17.

The Justices' opinions in *Morse* on the constitutional import of the White Primary Cases do not, of course, represent holdings on that issue, since the question in *Morse* was whether the Virginia Republican Party's actions were those of a "state or political subdivision" under the Voting Rights Act, and not whether they where those of a "state" under the Constitution and § 1983. Nonetheless, Justice Stevens' opinion made clear that he equated the two, and that he based his conclusion about the Voting Rights Act on his reading of the constitutional test of the White Primary Cases. *See, e.g., id.* at 1206 ("The Voting Rights Act uses the same word as the Fifteenth Amendment--'state'--to define the authorities bound to honor the right to vote.... Imposing different constructions on the same word is especially perverse in light of the fact that the Act ... was passed to enforce that very Amendment."). Whether Justice Breyer intended to equate the two is much less certain. *See id.* at 1215 (Breyer, J.) ("We need not go further in determining when party activities are, in effect,

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[26] That view was in sharp contrast to the view of three of the dissenters, who would have limited the White Primary Cases to "state-regulated elections or elections conducted by organizations which in practice produce the uncontested choice of public officials." *Id.* at 1229 (Thomas, J., dissenting) (quoting *Flagg Bros.*, 436 U.S. at 158).

substitutes for state nominating primaries because the case before us involves a nominating convention that resembles a primary about as closely as one could imagine."). Justice Thomas, writing for himself, the Chief Justice, and Justice Scalia, however, had no doubt. He described both the Stevens and Breyer opinions as "suggesting that the meaning of the statutory term `State' in § 5 is necessarily coterminous with the constitutional doctrine of state action." *Id.* at 1228 (Thomas, J.); *see also id.* at 1234 ("The basis for today's decision ... can only be the state action doctrine.").

If the result in *Morse* signals the Court's future view of state action in the electoral context, then there would be grounds for concluding that the Democratic Party's conduct here constituted state action. As noted in Part IV, the states have delegated substantial control over the delegate-selection process to the state party. The states also have given the candidates that emerge from the national party conventions various forms of preference in access to the states' general election ballots. *Cf. Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 894 n.8 (2d Cir. 1980) (suggesting that nominating procedures must conform to constitutional requirements because "ensured access to the ballot [may] constitute[] a form of state action").

But even if a political party could be considered a state actor, it is at the same time clothed with strong First Amendment protections against intrusion by the state.[27] This is not simply a matter of dividing the universe of potential party activities into their public (state) and private (First

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[27] *See Eu*, 489 U.S. at 224 ("It is well settled that partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendments."); *Tashjian*, 479 U.S. at 214 ("The freedom of association protected by the First and Fourteenth Amendments includes partisan political organizations."); *La Follette*, 450 U.S. at 121 ("`The National Democratic Party and its adherents enjoy a constitutionally protected right of political association.'") (quoting *Cousins*, 419 U.S. at 487); *see also Faulkner County*, 49 F.3d at 1295 ("The Supreme Court has located political parties roughly midway between conventional public and private institutions, attributing to parties elements of both."); *cf. Polk County v. Dodson*, 454 U.S. 312, 321, 325, 70 L. Ed. 2d 509, 102 S. Ct. 445 (1981) (holding that "it is the constitutional obligation of the State to respect the professional independence" of public defenders, even though some actions of public defenders may be under color of state law).

Amendment-protected) spheres. The Court's cases have made clear that the very actions at issue here--the Party's decisions about who can be nominated as delegates and even about who can be considered a Democrat--are themselves clothed in First Amendment protection. Indeed, those cases suggest that if the State of Louisiana had tried to assist LaRouche by attempting to enforce the results of its primary (which yielded him one delegate) against the DNC, it would have been met with the bar of the First Amendment.

For example, the plaintiffs in *Cousins v. Wigoda*, the Wigoda delegates, had been elected in the state-run Illinois primary as Chicago's delegates to the 1972 Democratic National Convention. The Cousins delegates, who had been picked at private party caucuses, successfully challenged the seating of the Wigoda delegates before the Credentials Committee on the ground that the latter had been selected in violation of party rules requiring, inter alia, participation by minorities, women and youth. The Wigoda delegates counterattacked by obtaining an injunction from an Illinois court barring the Cousins delegates from taking their seats. *See* 419 U.S. 477 at 478-81 & n.1, 95 S. Ct. 541, 42 L. Ed. 2d 595. The Supreme Court vacated the injunction, holding that "the National Democratic Party and its adherents enjoy a constitutionally protected right of political association," *id.* at 488, that the "subordinating interest of the State must be compelling ... to justify the injunction's abridgement of the exercise" of those rights, *id.* at 489 (internal quotation omitted), and that Illinois' interest in ensuring that its primary results were honored "cannot be deemed compelling in the context of the selection of delegates to the National Party Convention," *id.* at 491.

The Court followed *Cousins* in *La Follette*. There, the Court ruled that the Wisconsin Supreme Court could not insist that delegates chosen through the state's non-partisan, open primary be seated at the 1980 Democratic National Convention, when DNC rules provided that only voters publicly affiliated with the Party could participate in the delegate-selection process. "The issue," the Court said, "is whether the State may compel the National Party to seat a delegation chosen in a way that violates the rules of the Party. And this issue was resolved, we believe, in *Cousins v. Wigoda*." 450 U.S. at 121. Finding that the State did not have

"compelling interests ... [to] justify its substantial intrusion into the associational freedom of members of the National Party," the court reversed the Wisconsin court's decision. *Id.* at 124-26.

The fact that the actions of the Democratic Party at issue here themselves have a First Amendment dimension strongly suggests that we should not apply the usual test for the validity of electoral restraints imposed by state governments--even if we were to conclude that the Party is a state actor. As the Court said in *O'Brien*, even if party delegateselection rules are state action, we still must consider "the reach of the Due Process Clause in this unique context." 409 U.S. at 4; *cf. Ripon*, 525 F.2d at 578-79 (noting that a given constitutional command may impose different requirements on different parts of the state). We consider the appropriate test to apply to the DNC rules in the next section, and apply that test in the one thereafter. We conclude that even were we to view Rule 11(K) and the Fowler letter as state action, defendants did not violate constitutional rights guaranteed to LaRouche and his supporters. For that reason, as we did in *Ripon*, we assume without deciding that defendants are state actors and proceed to the next stage of the analysis.

B

In this section we consider how strictly to scrutinize the conduct attacked by LaRouche. LaRouche contends that the appropriate standard is strict scrutiny, requiring the party to demonstrate that its rules are "narrowly tailored to serve a compelling interest." Although in the past the Supreme Court did apply strict scrutiny to state restrictions on candidates and parties seeking access to the ballot, *see, e.g., Rhodes*, 393 U.S. at 31; *see also* Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 890 (13th ed. 1997), more recent cases have employed the two-pronged approach described in *Burdick v. Takushi*, 504 U.S. 428, 119 L. Ed. 2d 245, 112 S. Ct. 2059 (1992). Under this approach, "when [First and Fourteenth Amendment] rights are subjected to `severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* at 434 (internal quotation omitted). However, "when a state election law provision imposes only `reasonable, nondiscriminatory

restrictions'..., the State's important regulatory interests are generally sufficient...." *Id.* (internal quotation omitted); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S. Ct. 1364, 1370, 137 L. Ed. 2d 589 (1997).

Accordingly, even if we were to apply the Burdick test to the DNC's rules, it would not necessarily result in strict scrutiny. LaRouche and his supporters plainly do have First Amendment interests at stake.[28] But if the restrictions imposed on plaintiffs are viewed from the standpoint of the "state's" electoral process as a whole--that is, as a combination of ballot access provided through both political party nomination and independent candidacy--it is not necessarily clear that the restrictions on plaintiffs were "severe." LaRouche's adherents still retained the right to express their political views by supporting other Democratic nominees, even if they could not nominate LaRouche.[29] And LaRouche retained the right to run, and his supporters the right to vote for him, as either a third-party or independent candidate.[30]

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[28] *See Tashjian*, 479 U.S. at 214 ("The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."); *Anderson*, 460 U.S. at 787-88 ("The exclusion of candidates ... burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens.").

[29] *Cf. Anderson*, 460 U.S. at 791 n.12 (finding burden imposed by state disaffiliation requirement in *Storer v. Brown* less severe than early filing deadline for independent candidates in *Anderson* because, "although a disaffiliation provision may preclude [independent] voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates"); *Timmons*, 117 S. Ct. at 1371, 1372 ("[Although] Minnesota's fusion ban prevents the New Party from using the ballot to communicate to the public that it supports a particular candidate who is already another party's candidate," "the New Party remains free to endorse whom it likes, to ally itself with others, to nominate [other] candidates for office, and to spread its message to all who will listen.").

[30] *See Storer*, 415 U.S. at 728 ("The State must ... provide feasible means for other political parties and other candidates to appear on the general election ballot."); *cf. Ripon*, 525 F.2d at 586 ("Theoretically at least, persons dissatisfied with the choice facing them in [the general] election may gain access to the ballot by means other than a major party

Nor is there any reason to believe that LaRouche's ultimate chances of becoming President would have been measurably lessened by taking those routes than by seeking nomination at the Democratic National Convention--where by his own count he would have had only two of 4320 delegates. *See* Appellants' Br. at 8 n.8; Appellees' Br. at 3. Accordingly, even if the specific burden imposed on LaRouche by the DNC Rules were "severe," the overall burden imposed by the "state" may not have been severe enough to require strict scrutiny under *Burdick*.

More importantly, we are not persuaded that the *Burdick* test is appropriate for application to this case. That test, after all, was designed for a challenge to a state law *by* a citizen or political party asserting First Amendment rights, and hence weighs the state's interests against the rights protected by the Amendment. It was not designed for a case in which the First Amendment weighs on both sides of the balance. The application of judicial strict scrutiny to the internal rules of a political party (setting aside, because they are not at issue here, party rules that effectively control state-run primary ballots) simply raises too many troubling questions.[31]

May a court require a political party--itself a First Amendment creature--to show a compelling justification before it may limit a putative candidate's ability to associate himself with the party? May a court require a political party to show that such a limitation is narrowly tailored to meet that compelling justification? The difficulty of the issue is made manifest by holding it up to a mirror: if a state, finding Rule 11(K) unfair, were to adopt LaRouche's position by statute (by, for example, outlawing "litmus tests" for party nominees), could the Party be required to show a compelling interest for

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nomination."); *Duke v. Massey*, 87 F.3d 1226, 1233 (11th Cir. 1996) ("Duke supporters do not have a First Amendment right to associate with him as a Republican Party presidential candidate. Duke's supporters were not foreclosed from supporting him as an independent candidate, or as a third party candidate in the general election.") (citation omitted).

[31] As in *Ripon*, we also intimate no view about what standard should apply in a situation, like the White Primary Cases, "where there is only one party with a realistic chance to win the election, and where a vote in the nominating process is the only effective vote that can be cast." 525 F.2d at 589.

its rule to invalidate the statute? We already know the Supreme Court's likely answer to this question, as *Cousins* and *La Follette* presented similar situations. The answer is that the DNC would not have the burden of justifying its rule. To the contrary, it is the state that would have to show that its interest was "compelling ... to justify the ... abridgment of the exercise by ... the National Democratic Party of [its] constitutionally protected rights." *Cousins*, 419 U.S. at 489; *see La Follette*, 450 U.S. at 124; *see also Eu*, 489 U.S. at 225 (holding that California law barring political party from endorsing candidates in primary "can only survive constitutional scrutiny if it serves a compelling governmental interest").

But if a state cannot, at the behest of a plaintiff like LaRouche, require a political party to change its rules unless it can show a compelling reason for retaining them, then should it make a difference if a federal court is asked to impose the same requirement? The federal courts, after all, act with the authority of the "state" (i.e., the federal government), and their intrusion into the First Amendment rights of a political party can be as invasive as that of any state. *Cf. Tashjian*, 479 U.S. at 224 ("`[A] State, or a court, may not constitutionally substitute its own judgment for that of the Party.'") (quoting *La Follette*, 450 U.S. at 123-24) (emphasis added);[32] *O'Brien*, 409 U.S. at 5 (recognizing that "vital rights of association guaranteed by the Constitution" are involved in federal court challenges to party delegate-seating decisions). As we have noted above, in *Cousins* the Wigoda delegates asserted the authority of state law to bar the Democratic Party from seating delegates elected according to Party rules. The Court responded that state law could not support such an intrusion unless the State's interests were compelling. *See* 419 U.S. 477 at 489, 95 S. Ct. 541, 42 L. Ed. 2d 595. If the Wigoda delegates instead had asserted the authority of the U.S. Constitution to support the same end, would the burden of showing a compelling interest have been completely reversed? We doubt such a change in argument would have so dramatically altered the parties' burdens.

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[32] Although *La Follette* made this statement in the course of reversing a state court judgment, *Tashjian* quoted it in the context of a federal action.

There is yet another reason for rejecting the applicability of strict scrutiny to intra-party rules. One of the principal triggers for such scrutiny in the usual First Amendment context is viewpoint discrimination. *See, e.g., Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-30, 132 L. Ed. 2d 700, 115 S. Ct. 2510 (1995). Yet that trigger is of doubtful applicability in the political party context. In this case, for example, one of LaRouche's complaints is that "the very nature of the `test' which is embodied in Rule 11(K)"--a test limiting candidates to "bona fide Democrats"--is by definition "an invasion of the free speech of candidates." Appellants' Br. at 28. Indeed, were the State of Louisiana to adopt a similar rule for the general election--for example, by limiting the ballot to bona fide Democrats, or to Democrats and Republicans while excluding independents--there can be little doubt that the State's law would fall. *See Rhodes*, 393 U.S. at 32 (invalidating ballot access law that "favors two particular parties--the Republicans and the Democrats--and in effect tends to give them a complete monopoly"); *supra* note 30; *cf. Burdick*, 504 U.S. at 434 (applying lesser scrutiny only where state imposes "nondiscriminatory restrictions").

But it is also obvious that viewpoint discrimination by a political party is quite another matter. Indeed, it is the *sine qua non* of a political party that it represent a particular political viewpoint. And it is the purpose of a party convention to decide on that viewpoint, in part by deciding which candidate will bear its standard: the liberal or the conservative, the free trader or the protectionist, the internationalist or the isolationist. Unlike a state, which is largely barred from making such decisions, a political party must make these decisions. Since in the end there will be only one Democratic and one Republican Party candidate on the general election ballot, their conventions ultimately *must* choose a political viewpoint. Surely even plaintiffs would agree that if the Democratic Party had chosen LaRouche over President Clinton as its candidate in 1996, the choice would have constituted the expression of a particular political point of view.

In sum, we conclude that even if a political party is a state actor, the presence of First Amendment interests on both sides of the equation makes inapplicable the test applied to

electoral restrictions where the First Amendment weighs on only one side. As the Supreme Court has not yet had to devise a test for such a case, we return to the one this court applied the last time it faced a similar situation. In *Ripon*, we found that plaintiffs' equal protection interest in the delegate-selection rules of a political party was "offset by the First Amendment rights exercised by the Party in choosing the [delegate allocation] formula it did." 525 F.2d at 588. Accordingly, we concluded that even if the Party were a state actor, the Constitution was "satisfied if [the party's rules] rationally advance some legitimate interest of the party in winning elections or otherwise achieving its political goals." *Id.* at 586-87. Notwithstanding the passage of time since it was first announced, this test remains the one that best effectuates the Supreme Court's direction to approach judicial intervention in this area "with great caution and restraint," and to recognize "the large public interest in allowing the political processes to function free from judicial supervision." *O'Brien*, 409 U.S. at 4-5.[33]

C

We begin the *Ripon* analysis by noting that the Party interest at issue is a "legitimate" one. "There are no racial or other invidious classifications here" as there were in the White Primary Cases. *Ripon*, 525 F.2d at 588; *see also Eu*, 489 U.S. at 232 ("This ... is not a case where intervention is necessary to prevent the derogation of the civil rights of party adherents."). There is, of course, viewpoint discrimination at play. But as we have already noted, there is nothing illegitimate about that kind of discrimination in a political party's nomination process.

Moreover, the Party's interest is not merely legitimate. Here, the associational rights of the Democratic National Party are at their zenith. The Party's ability to define who is a "bona fide Democrat" is nothing less than the Party's ability to define

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[33] While *Ripon*, unlike this case, involved a "one person, one vote" challenge, this distinction does not change our analysis. Notably, the *Ripon* court thought its case was analogous to others involving different constitutional challenges, including those under the First Amendment. *See* 525 F.2d at 586 n.61.

itself. In *Eu*, for example, one of the challenged state laws "prevented party governing bodies from stating whether a candidate adheres to the tenets of the party or whether party officials believe that the candidate is qualified for the position sought." 489 U.S. at 223. The Court struck the law down. "Freedom of association," Justice Marshall said, "means ... that a political party has a right to `identify the people who constitute the association' ... and to select a `standard bearer who best represents the party's ideologies and preferences.'" *Id.* at 224 (quoting *Tashjian*, 479 U.S. at 214, and *Ripon*, 525 F.2d at 601 (Tamm, J., concurring)); *see also La Follette*, 450 U.S. at 122 n.22 ("`Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'") (quoting L. Tribe, American Constitutional Law 791 (1978)).[34]

The Party's effort to limit the list of candidates who can represent themselves to the voters as Democrats "rationally advance[s the] legitimate interest of the party in winning elections." *Ripon*, 525 F.2d at 586-87. By narrowing the field of those who represent it, the Party seeks to define its values, distinguish them from those of its competitors, and thereby attract like-minded voters. At the same time, it seeks to prevent confusion among those voters by excluding from its list of potential presidential nominees those who do not share those values. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189, 93 L. Ed. 2d 499, 107 S. Ct. 533 (1986) (holding state interest in avoiding voter confusion, ballot overcrowding, or the presence of frivolous candidates sufficient to justify reasonable restrictions on ballot access by minor parties). It advances the Party's ability to "achieve its political goals" in other ways as well. 525 F.2d at 587. As the Court said in *La Follette*, when barring Wisconsin from requiring the

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[34] The Eleventh Circuit reached a similar conclusion in *Duke v. Massey*, holding that "the Republican Party has a First Amendment right to freedom of association and an attendant right to identify those who constitute the party based on political beliefs.... Therefore the ... Republican Party did not have to accept [David] Duke as a Republican presidential candidate. Duke does not have the right to associate with an `unwilling partner.'" 87 F.3d at 1234.

Democratic Party to accept delegates selected through the state's open primary:

> Here, the members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the process leading to the selection of delegates to their National Convention. On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions--thus impairing the party's essential functions--and that political parties may accordingly protect themselves from intrusion by those with adverse political principles.

450 U.S. at 122 (internal quotation omitted).

LaRouche, of course, would dispute the applicability of this passage, arguing that unlike the open primary voters in Wisconsin, he is not "unaffiliated" with the Democratic Party and does not have "adverse political principles." But the Party itself obviously disagrees--and vociferously so. *See* J.A. 73-74 (Fowler letter) ("Mr. Larouche's [sic] expressed political beliefs ... [are] utterly contrary to the fundamental beliefs, values and tenets of the Democratic Party...."). Nor is the Party required to accept LaRouche's selfdesignation as the final word on the matter. Rather, the Party's "freedom to join together in furtherance of common political beliefs `necessarily presupposes the freedom to identify the people who constitute the association.'" *Tashjian*, 479 U.S. at 214 (quoting *La Follette*, 450 U.S. at 122); *see* 479 U.S. at 224 ("The Party's determination of the boundaries of its own association ... is protected by the Constitution.").

LaRouche makes clear that his fundamental complaint is not so much with the Party's right to define itself, but rather with the "unfair" manner in which he contends it has done so. Even this claim is less than fully developed. Although he complains of the vagueness of the "bona fide Democrat" standard, he proposes no alternative substantive definition, and we can think of none that a court could impose within the strictures of the First Amendment. Indeed, LaRouche does not

even propose an alternative set of procedures for selecting delegates, nor does he insist that the only fair procedure would be to seat any delegate whose candidate won sufficient votes in a primary. Instead, he asks only that the Party be enjoined "from promulgating similar provisions as found in Rule 11(K), in the future." Compl. ¶ 150 (J.A. 49).

The answer to this aspect of LaRouche's complaint is that the Party's First Amendment rights extend not only to defining itself, but also to determining how to define itself. The Supreme Court made this point in both *Cousins* and *La Follette* by upholding the Party's right to determine who could select its delegates, notwithstanding the states' views that a different process would be more appropriate. *See, e.g., La Follette*, 450 U.S. at 124 ("A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution."). The Court faced a similar question again in *Eu*, where the California Elections Code dictated, among other things, the organization and composition of the state parties' official governing bodies. To ensure fairness to the state's various regions, the Code required that the position of party chair rotate between residents of northern and southern California. *See* 489 U.S. 214 at 216, 109 S. Ct. 1013, 103 L. Ed. 2d 271. Citing its decisions in *Cousins* and *La Follette*, the Court struck the law down, saying: "[A] political party's determination ... of the structure which best allows it to pursue its political goals is protected by the Constitution. Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu*, 489 U.S. at 229 (internal quotations and citations omitted). "[A] State cannot," the Court said, "substitute its judgment for that of the party as to the desirability of a particular internal party structure." *Id.* at 233.

This court reached the same conclusion in *Ripon*, where we rejected the contention that the Equal Protection Clause required the Republican Party to allocate its national convention delegates on a one-person, one-vote basis. In letting stand the Party's practice of awarding "victory bonuses" to states voting Republican in prior elections, we observed:

> A party is .... more than a forum for all its adherents' views. It is an organized attempt to

> see the most important of those views put into practice through control of the levers of government. One party may think the best way to do so is through a `strictly democratic' majoritarianism. But another may think it can only be done (let us say) by giving the proven party professionals a greater voice....

Ripon, 525 F.2d at 585 (footnote omitted).

A party may, of course, pay heavily at the polls for the perception that it treats its members, delegates, or candidates unfairly. But that is a matter for the party to weigh, and for the people to decide in the general election. It is not a basis upon which a court can intervene as long as the party's processes rationally advance its legitimate interests.

Rule 11(K) and the Fowler letter were issued pursuant to the authority duly granted to the DNC and Chairman Fowler by the Charter and Bylaws of the Democratic Party.[35] If LaRouche disputed Fowler's authority or conclusions, the place to take that dispute was to the national convention's Credentials Committee and, if he received no satisfaction, to the floor of the convention itself.[36] As the Supreme Court said in *O'Brien*, "it has been understood since our national political parties first came into being as voluntary associations of

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[35] The Charter of the Democratic Party provides that "delegates shall be chosen ... according to the standards ... as may be specifically authorized by the Democratic National Committee in the Call to the Convention." *See* Charter of the Democratic Party of the United States art. 2, § 4 (1995) (J.A. 281). The Bylaws provide that "the Chairperson ... shall exercise authority delegated to him or her by the Democratic National Committee." *See* Bylaws of the Democratic Party of the United States § 12 (1995) (J.A. 296).

[36] The Call for the 1996 Democratic National Convention provided that "the Credentials Committee shall determine and resolve questions concerning the seating of delegates and alternates to the Convention.... The committee shall report to the Convention for final determination and resolution of all such questions." The Call for the 1996 Democratic National Convention art. VII(I)(1) (J.A. 325). The Convention is "the highest authority of the Democratic Party," Charter of the Democratic Party of the United States art. 2, § 2 (J.A. 281), and its adoption of the Credentials Committee report determines the final roll of those who may be seated at the Convention, *see* J.A. 277 (Boylan Aff.).

individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated." 409 U.S. at 4.[37] Because the First Amendment protects the decisions made by defendants in this case, we are unable to afford plaintiffs the relief they seek.[38]

VI

The district court's dismissal of the complaint as to the District of Columbia Democratic Party, the District of Columbia Democratic State Committee, and the Chairman of the District of Columbia Democratic State Committee is affirmed. Plaintiffs' claims against the remaining defendants under section 5 of the Voting Rights Act are remanded to the district court for the convening of a three-judge court. The district court's dismissal of plaintiffs' claims under all other statutory and constitutional provisions is affirmed.

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[37] Since the Credentials Committee forum was available to resolve LaRouche's complaint before the contested delegates were formally seated, we reject his brief suggestion that the DNC deprived him of a liberty interest without an "opportunity to be heard," in violation of the Due Process Clause. In any event, our conclusion that the Constitution protects the decisions the Party made here would render such a procedural due process claim untenable. We also reject LaRouche's contention that Fowler's characterization of his political beliefs as "racist and anti-Semitic" deprived him of a "liberty" interest without due process of law. *See Siegert v. Gilley*, 500 U.S. 226, 233, 114 L. Ed. 2d 277, 111 S. Ct. 1789 (1991).

[38] This conclusion applies to plaintiffs' claims against all of the defendants, who include state party officials and committees as well as Fowler and the DNC. Plaintiffs' constitutional claims do not differentiate among the groups of defendants, nor do they suggest that the state defendants did anything other than obey the instructions of Fowler and the DNC.

NOTICE OF APPEAL, NOVEMBER 19, 1999

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LYNDON H. LaROUCHE, Jr.,	:	
ALEX D. PROMISE,	:	
CHARLES SHAW,	:	
DELORES WHITAKER,	:	
NATHANIEL SAWYER,	:	
JOEL DEJEAN,	:	
ELOI MORALES, and	:	
MARIA ELENA	:	Civil Action No.
LEVYA MILTON,	:	96-1816
	:	(DBS, TPJ, KHK)
Plaintiffs,	:	(Three Judge Court)
	:	
vs.	:	
	:	
DONALD L. FOWLER,	:	
individually & as	:	
Chairman Democratic	:	
National Committee et al.	:	
	:	
Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that Lyndon H. LaRouche, Jr., Alex D. Promise, Charles Shaw, Delores Whitaker, Nathaniel Sawyer, Joel Dejean, Eloi Morales, and Maria Elena Levya Milton, all of the plaintiffs in the above named case, hereby appeal to the United States Supreme Court from this Court's Opinion and Order entered on November 1, 1999, dismissing this case. Appeal is taken pursuant to the Voting Rights Act of 1965 (as amended), 42 U.S.C. 1973c, which directs appeal of this decision to the United States Supreme Court and pursuant to the Rules of the United States Supreme Court.

Respectfully submitted,

LYNDON H. LAROUCHE, JR. et al.
By Counsel
James F. Schoener
Odin P. Anderson
James E. Wilson, Jr.
Theo Mitchell
Nina J. Ginsberg

Dated: November 19, 1999

By: Nina J. Ginsberg
DIMURO, GINSBERG & MOOK, P.C.
D.C. Bar # 251496
908 King St., Suite 200
Alexandria, VA 22314
(703) 684-4333
(703)-548-3181 (Fax)

Section 5 of the Voting Rights Act of 1965,
42 U.S.C. § 1973c (1988):

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgment of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State for political subdivision with respect to which the prohibitions set forth in § 1973b(a) of this title based upon determinations made under the first sentence of § 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in § 1973b(a) of this title based upon determinations made under the second sentence of § 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in § 1973b(a) of this title based upon determinations made under the third sentence of § 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State of subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in § 1973b(f)(2) of this title, and unless and until the court enters judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been

submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of § 2284 of title 28 and any appeal shall lie to the Supreme Court.

Section 14 of the Voting Rights Act of 1965, 42 U.S.C. § 1973l

§ 1973l. Enforcement proceedings.

(a) Criminal contempt. All cases of criminal contempt arising under the provisions of this Act shall be governed by section 151 of the Civil Rights Act of 1957 [42 USCS § 1995].

(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction. No court other than the District Court for the District of Columbia or a court of appeals in any proceeding under section 9 [42 USCS § 1973g] shall have jurisdiction to issue any declaratory judgment pursuant to section 4 or section 5 [42 USCS § 1973b or 1973c] or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of this Act or any action of any Federal officer or employee pursuant hereto.

(c) Definitions. (1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election. (2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting. (3) The term "language minorities" or "language minority group" means persons who are American Indians, Asian Americans, Alaskan Natives or Spanish heritage.

(d) Subpoenas. In any action for a declaratory judgment brought pursuant to section 4 or section 5 of this Act [42 USCS § 1973b or 1973c], subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial district of the United States: *Provided,* That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater

distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Attorney's fees. In any action or proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments [USCS Constitution, Amendments 14, 15] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

28 CFR Ch. 1, Part 51
Subpart A -- General Provisions

§ 51.1 Purpose.

(a) Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, prohibits the enforcement in any jurisdiction covered by section 4(b) of the Act, 42 U.S.C. 1973b(b), of any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage, until either:

(1) A declaratory judgment is obtained from the U.S. District Court for the District of Columbia that such qualification, prerequisite, stand, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, or

(2) It has been submitted to the Attorney General and the Attorney General has interposed no objection within a 60-day period following submission.

(b) In order to make clear the responsibilities of the Attorney General under section 5 and the interpretation of the Attorney General of the responsibility imposed on others under this section, the procedures in this part have been established to govern the administration of section 5.

§ 51.2 Definitions.

As used in this part --

Act means the Voting Rights Act of 1965, 79 Stat. 437, as amended by the civil Rights Acto of 1968, 82 Stat. 73, the Voting Rights Act Amendments of 1970, 84 Stat. 314, the District of Columbia Delegate Act, 84 Stat. 853, the Voting Rights Act Amendments of 1975, 89 Stat. 400, and the Voting Rights Act Amendments of 1982, 96 Stat. 131, 42 U.S.C. 1973 *et seq*. Section numbers such as "section 14(c)(3)," refer to sections of the Act.

Attorney General means the Attorney General of the United States, or the delegate of the Attorney General.

Change affecting voting means any voting qualification, prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on the date used to determine coverage under section 4(b) and includes, *inter alia*, the examples given in § 51.13.

Covered jurisdiction is used to refer to a State, where the determination referred to in § 51.4 has been made on a statewide basis, and to a political subdivision, where the determination has not been made on a statewide basis.

Language minorities or *language minority group* is used, ad defined in the Act, to refer to persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage. (Sections 14(c)(3) and 203(e)). See 28 CFR part 55, Interpretative Guidelines: Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups.

Political subdivision is used, as defined in the Act, to refer to "any county of parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." (Section 14(c)(2)).

Preclearance is used to refer to the obtaining of the declaratory judgment described in section 5, to the failure of the Attorney General to interpose an objection pursuant to section 5, or to the withdrawal of an objection by the Attorney General pursuant to § 51.48(b).

Submission is used to refer to the written presentation to the Attorney General by an appropriate official of any change affecting voting.

Submitting authority means the jurisdiction on whose behalf a submission is made.

Vote and *voting* are used, as defined in the Act, to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election." (Section 14(c)(1)).

§ 51.7 Political parties.

Certain activities of political parties are subject to the preclearance requirement of section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. For example, changes with respect to the recruitment of party members, the conduct of political campaigns, and the drafting of party platforms are not subject to the preclearance requirement. Changes with respect to the conduct of primary elections at which party nominees, delegates to party conventions, or party officials are chosen are subject to the preclearance requirement of section 5. Where appropriate, the term "jurisdiction" (but not "covered jurisdiction") includes political parties.

§ 51.8 Section 3 coverage.

Under section 3(c) of the Act, a court in voting rights litigation can order as relief that a jurisdiction not subject to the preclearance requirement of section 5 preclear its voting changes by submitting them either to the court or to the Attorney General. Where a jurisdiction is required under section 3(c) to preclear its voting changes, and it elects to submit the proposed changes to the Attorney General for preclearance, the procedures in this part will apply.

§ 51.12 Scope of requirement.

Any change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change must meet the section 5 preclearance requirement.

§ 51.13 Examples of changes.

Changes affecting voting include, but are not limited to, the following examples:

(a) Any change in qualifications or eligibility for voting.

(b) Any change concerning registration, balloting, and the counting of votes and any change concerning publicity for or assistance in registration or voting.

(c) Any change with respect to the use of a language other than English in any aspect of the electoral process.

(d) Any change in the boundaries of voting precincts or in the location of polling places.

(e) Any change in the constituency of an official or the boundaries of a voting (e.g., through the redistricting, annexation, deannexation, incorporation, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections).

(f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).

(g) Any change affecting the eligibility of persons to become or remain candidates, to obtain a position on the ballot in primary or general elections, or to become or remain holders of elective offices.

(h) Any change in the eligibility and qualification procedures for independent candidates.

(i) Any change in the term of an elective office or an elected official or in the offices that are elective (e.g., by shortening the term of an office, changing from election to appointment or staggering the terms of offices).

(j) Any change affecting the necessity of or methods for offering issues and propositions for approval by referendum.

(k) Any change affecting the right or ability of persons to participate in political campaigns which is effected by a jurisdiction subject to the requirement of section 5.

§ 51.14 Recurrent practices.

Where a jurisdiction implements a practice or procedure periodically or upon certain established contingencies, a change occurs: (a) The first time such a practice or procedure is implemented by the jurisdiction, (b) when the manner in which such a practice or procedure is implemented by the jurisdiction is changed, or (c) when the rules for determining when such a practice or procedure will

be implemented are changed. The failure of the Attorney General to object to a recurrent practice or procedure constitutes preclearance of the future use of the practice or procedure if its recurrent nature is clearly stated or described in the submission or is expressly recognized in the final response of the Attorney General on the merits of the submission.

§ 51.17 Special elections.

(a) The conduct of a special election (e.g., an election to fill a vacancy; an initiative, referendum, or recall election; or a bond issue election) is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the practices or procedures to be followed.

(b) Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement.

(c) A jurisdiction conducting a referendum election to ratify a change in a practice or procedure that affects voting may submit the change to be voted on at the same time that is submits any changes involved in the conduct of the referendum election. A jurisdiction wishing to receive preclearance for the change to be ratified should state clearly that such preclearance is being requested. See § 51.22 of this part.

§ 51.18 Court-ordered changes.

(a) *In general.* Changes affecting voting that are ordered by a Federal court are subject to the preclearance requirement of section 5 to the extent that they reflect the policy choices of the submitting authority.

(b) *Subsequent changes.* Where a court-ordered change is not itself subject to the preclearance requirement, subsequent changes necessitated by the court order, but decided upon by the jurisdiction remain subject to preclearance. For example, voting precinct and polling place changes made necessary by a court-ordered redistricting plan are subject to section 5 review.

(c) *In emergencies.* A Federal court's authorization of the emergency interim use without preclearance of a voting

change does not exempt from section 5 any use of the practice not explicitly authorized by the court.

§ 51.23 Party and jurisdiction responsible for making submissions.

(a) Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the submitting authority or by any other authorized person on behalf of the submitting authority. When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf. Where a State is covered as a whole, State legislation (except legislation or local applicability) or other changes undertaken or required by the State shall be submitted by the State.

(b) A change effected by a political party (see § 51.7) may be submitted by an appropriate official of the political party.

Democratic National Committee
Donald L. Fowler, National Chair
Christopher J. Dodd, General Chair

January 5, 1996

To Democratic Party Chairs:

Rule 11(K) of the Delegate Selection Rules for the 1996 Democratic National Convention adopted by the Democratic National Committee on March 12, 1994, provides that, for purposes of those Rules, a qualified candidate for the nomination of the Democratic Party for President –

> must be registered to vote, must be a declared Democrat, and must, as determined by the Chairman of the Democratic National Committee, have established a bona fide record of public service, accomplishment, public writings and/or public statements affirmatively demonstrating that he or she has the interests, welfare, and success of the Democratic Party of the United States at heart and will participate in the Convention in good faith.

Under Article VI of the Call to the Democratic National convention, adopted by the Democratic National Committee on January 21, 1995, the term "presidential candidate" means:

> ... any person who, as determined by the National Chairperson of the Democratic National Committee, has accrued delegates in the nominating process and plans to seek the nomination, has established substantial support for his or her nomination as the Democratic candidate for the office of the President of the United States, is a bona fide Democrat whose record of public service, affirmatively demonstrates tht he or she if faithful to the interests, welfare, and success of the Democratic Party of the United States, and will participate in the Convention in good faith.

This is to notify you that, under the authority granted to me by the Delegate Selection Rules and the Call, I have determined that Lyndon Larouche is not a bona fide Democrat, and does not possess a record affirmatively demonstrating that

he is faithful to, or has at heart, the interests, welfare, and success of the Democratic Party of the United States. This determination is based on Mr. Larouche's expressed political beliefs, including beliefs which are explicitly racist and anti-Semitic, and otherwise utterly contrary to the fundamental beliefs, values and tenets of the Democratic Party, and is also based on his past activities, including exploitation and defrauding contributors and voters.

Accordingly, Mr. Larouche is not to be considered a qualified candidate for nomination of the Democratic Party for President under the Delegate Selection Rules, and is not to be considered a "presidential candidate" within the meaning of Article VI of the Call. Therefore, state parties, in the implementation of their delegate selection plans, should disregard any votes that might be cast for Mr. Larouche, should not allocate delegate positions to Mr. Larouche, and should not recognize the selection of delegates pledged to him at any stage of the Delegate Selection Process.

Further, Mr. Larouche will not be entitled to have his name placed in nomination for the office of President at the 1996 Democratic National Convention. No certification of a delegate pledged to Mr. Larouche will be accepted by the Secretary of the DNC, and no such delegate shall be placed on the Temporary Roll of the Convention. The National Chair will, if necessary, and upon the proper filing of a challenge, recommend to the Credentials Committee of the 1996 Democratic National Convention that the Committee resolve that any such delegate not be seated at the Convention.

If you have any questions about the implementation of this notice, please do not hesitate to contact me or to contact the DNC's Rules and Bylaws Committee at (202) 863-7191.

Donald L. Fowler
National Chair

January 20, 1996

MEMORANDUM

To: Donald L. Fowler, National Chairman

A copy of your letter of January 5 to state party leaders, directing them to disregard any votes cast for Lyndon LaRouche was recently brought to our attention.

In the letter, you state your intention to deny LaRouche and any delegates pledged to him access to the National Convention, based on the fact that he is not a bona fide Democrat, and is "racist and anti-Semitic."

We have had the opportunity to meet Mr. LaRouche, and are familiar with his ideas. While you might not agree with everything LaRouche has to say, we can most surely attest to the fact that to label him a racist or anti-Semite is simply ridiculous. As a matter of fact, our experience is that a hefty portion of his support comes from the African-American community.

It is also the case that he has been a candidate for the Democratic presidential nomination on four previous occasions, without challenge to his credentials. He has been a vocal defender of the Clinton Administration, and has actively opposed Newt Gingrich's policies. We have also heard him say repeatedly that, should the President win the Democratic nomination, he fully intends to be actively supporting President Clinton's reelection following the National Convention.

To attempt to deny LaRouche access to the Convention is not only contrary to the fundamental spirit of the Democratic Party, it also threatens to cause an unnecessary rift in the party, with probably legal challenges, during a critical election period, when we ought to be principally concerned with defeating the Gingrich crowd. For many of us, it brings back bad memories of our Party's unfortunate attempt to lock out representatives of the Mississippi Freedom Party! Moreover, we believe that a debate on some of the views that Mr. LaRouche has raised is a useful and necessary addition to our internal discussions. And above all, the allegations on which the attempt to exclude him is premised are totally inaccurate.

We truly hope that this whole matter is based on a misunderstanding, and that we could correct it internally, before it gets out of hand and we'd be happy to sit down with you at your earliest convenience to talk about it.

(Signed,)
James Mann, former Member, US House of Representatives, Greenville, SC
John G. Dow, former Member, US House of Representatives, Albany, NY
Barney Schoby, Member, Mississippi General Assembly, Natchez, MS
Ben McGee, Member, Arkansas General Assembly, Marion, AR
Ben Swann, Member, Massachusetts General Assembly, Boston, MA
Ira B. Murphy, former Member, Tennessee General Assembly, Memphis, TN
Frank Williamson, former Member, Missouri General Assembly, St. Louis, MO
Peggy Steed Knight, former Member, Tennessee General Assembly, Memphis, TN
Roosevelt Bell, Member, Birmingham City Council, Birmingham, AL
Cornelius Fancher, Member, Bessemer City Council, Bessemer, AL
Robert Wood, County Commissioner; Chairman, Black Caucus of County Commissioners of Georgia; Southern Regional Director, NABCO, Conecah County, GA
John N. Mays, County Commissioner, Lee County, GA
James L. Barnett, Norwest Alabama Coalition of Black Trade Unionists, Florence, AL
Amelia Boynton Robinson, Member of the Board, Martin Luther King, Jr. Center for Nonviolent Social Change; Author, *Bridge Across Jordan*; 1990 Recipient, Martin Luther King Foundation Medal of Freedom; Tuskegee Institute, AL

cc: William J. Clinton, President of the USA
Senator Chris Dodd
Harold M. Ickes
Ann Lewis

To contact any of the signers list above, or for further information, call Dr. Debra Freeman (800) 545-5889; 3916 Vero Road, Suite A; Baltimore, MD 21227